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SOME NOTES ON THE OFFICE OF MASTER OF
THE ROLLS.¹

THE RIGHT HON. LORD HANWORTH.

THE origins of the Office of Master of the Rolls are to be sought in the history of the development of the Chancery.

The Chancery was at first a branch of the royal household closely connected with the king's chapel. The Chancellor was simply the king's chaplain who in the intervals of his proper duties acted as the king's secretary. As such he became the custodian of the king's seal,—later to be called the great seal to distinguish it from other and smaller seals,—and at length his secretarial duties increased so far that he became the head of a great administrative department.

It was the practice of the Chancery, certainly from the year 1199, to enter on parchment rolls copies of the most important letters sent. It was therefore only a question of time until a special clerk, a *custos rotulorum*, was required to keep these rolls. The first bearer of this title that we know by name is John de Kirkby, who held the office in 1265 and had a salary of twenty marks a year out of the issues of the Counties of Warwick and Leicester.² His name therefore stands at the head of the long succession of Masters of the Rolls. Some would trace the descent from a source still more remote and find the origin of the Master of the Rolls' office in the industrious official to whom reference is made in the *Dialogus de Scaccario* (*temp.* Henry II), the

¹ An address to the Cambridge University Law Society, February 8, 1935.

² Pipe Roll, 109.

clericus in charge of the king's *scriptorium*, 'whose duties, though they may be expressed in a few words, call for endless toil; as well they know who have so learned by experience.'³

Although his style came at length to be 'Master of the Rolls,' in the meantime the holder of the office was sometimes called '*custos*,' sometimes '*magister*,' *rotulorum cancellarie* or, in French, 'gardein des Roulles'.⁴ Other styles found are 'clerc des rolles,'⁵ 'clerk of the rolles,'⁶ and 'maister of the rollis'.⁷ A warrant dated November 28, 12 Edward IV (1472) requires 'Maister John Moorton, maister of our Rolles and Recordes in our Chancery,' to cause certain letters patent to be cancelled.⁸ Again, as one who acted for the Chancellor, the keeper or master of the rolls of Chancery was sometimes called 'the chief clerk of the Chancery' (*capitalis clericus Cancellarie*) and occasionally referred to as the 'Vice-chancellor of England'.⁹ The first statute to speak of the 'Master of the Rolls' is 11 Henry 7, c. 18 (1495), 'An Acte that the Master of the Rolles and other Offycers of the Chancery shall not goe to the warrs.' Chapter 25, however, of the same year calls him the 'Clerke of the Rolles'. Yet another style appears on certain monumental inscriptions in the Rolls Chapel (now the museum of the Public Record Office), *viz. sacrorum scriniorum magister* (in one instance *sacrorum scriniorum custos*); but this artificial style was never officially recognized. Until the appointment of Thomas Cromwell, a layman, in 1534, the office of Master of the Rolls was always held by a cleric. During the Interregnum we find William Lenthall (M.R. from 1643 to 1660) given the title of 'his lordship,' though not a peer¹⁰: possibly because the office had since the time of Elizabeth given the holder precedence between the Lord Chief Justice of England and the Chief Justice of the Court of Common Pleas.

From an entry on a Close Roll of the reign of Edward I, it appears that the Keeper of the Rolls of Chancery was appointed by the king:—

'Memorandum that on 1 October [1295], in the conventual church of St. Augustine, Canterbury, the custody of the rolls of Chancery was committed to Sir Adam de Osgoteby

³ Ed. Hughes, Crump & Johnson (1902), 77.

⁴ Rot. Parl. *passim*.

⁵ Acts of the Privy Council, IV, 158 (A.D. 1433).

⁶ *Ibid.* V, 106 (A.D. 1438).

⁷ *Ibid.* V, 126 (A.D. 1440).

⁸ Chancery Warrants, file 1662, No. 19.

⁹ *E.g.* Chronicles of Reigns of Edward I and Edward II (Rolls Series), vol. i, p. 287; and *Flores Historiarum* (Rolls Series), vol. iii, pp. 189, 190.

¹⁰ Sanders, Orders in Chancery, 280.

by Sir John de Langeton, the chancellor, on the king's behalf, so that he shall have the custody in the same manner as other keepers have been wont to have it in times past.' ¹¹

If the king was at Westminster the oath of office was taken at the marble stone in the Great Hall at Westminster:—

'*Memorandum* that on 4 July [18 Edward II, 1325] the king at Westminster in the presence of Master Robert de Baldok, his chancellor, and of others of his council, committed to Master Henry de Clyf, the king's clerk, the custody of the rolls of his chancery, to have in the same manner as others have had the same custody hitherto; and Henry, on the following day, in the great hall of Westminster, at the marble stone (*apud lapidem marmorium*) took oath to execute the office well and faithfully, . . . , and Sir Richard de Ayremynn, then keeper of the aforesaid rolls, there delivered to Henry the keys of the chests wherein the said rolls are kept.' ¹²

The Keeper of the Rolls of Chancery ranked as the first of the senior clerks of the Chancery, the *clerici de prima forma ad robas*, who were twelve in number and styled 'Masters of the Chancery' (*magistri cancellarie*). ¹³ The title of 'Master' suggests that these clerks were university graduates, and it is probable that they were, for the Chancery, by reason of the wide scope of its activities and the prospects of preferment which it afforded, provided an admirable career for ambitious young canonists and civilians from Oxford and Cambridge.

As the leading Chancery clerk and principal permanent official of the Chancery, the Keeper of the Rolls normally acted as keeper of the great seal in a temporary vacancy or during the Chancellor's absence. *E.g.*:—

'*Memorandum* that on Tuesday 1 March [2 Edward III, 1328], after dinner, John bishop of Ely, the Chancellor, in the king's chamber in the palace of W. Archbishop of York at York, delivered to the king his great seal in a bag under the bishop's seal; and the king on the same day, at vespers, in the chamber of Queen Isabella, in her presence and in the presence of the said bishop, H. bishop of Lincoln, Edmund earl of Kent . . . and others, delivered the seal, in the said bag sealed with the bishop of Ely's seal, to master Henry de

¹¹ Calendar of Close Rolls, 1288—1296, p. 454.

¹² Calendar of Close Rolls, 1323—1327, p. 386.

¹³ *Renovacio ordinum Cancellarie* (temp. Henry V). . . . *Imprimis quod sint duodecim magistri cancellarie . . . item quod Custos Rotulorum sit unus et primus eorundem duodecim.* Hargrave MSS., No. 219, p. 277; quoted by Sanders, *Orders in Chancery*, 7b.

Clyf, Keeper of the Rolls of Chancery, and to Sir William de Herlaston, clerk of the Chancery, to be kept by Henry under William's seal; and they there took oath to execute the office faithfully. And the king willed and ordered that Master Henry shall keep an inn [*hospitium*—the word is the same as that translated below 'household' and 'lodging'] for the clerks of Chancery and for other officers of the same, and that he shall receive the fee that other chancellors were wont to receive before the time of the aforesaid bishop of Ely in that office.' ¹⁴

It appears from this extract from the Close Rolls that the Keeper of the Rolls, when acting for the Chancellor, kept the household of the Chancery and drew the Chancellor's allowance (23s. a day and a ration of wine) for the diet of the clerks.

The household of the Chancery had come into being when the Chancery, finally losing its original connexion with the king's household and ceasing to travel with the king's court, found it necessary to acquire a permanent abode for its officials and records. As early as the reign of Edward I we find a reference to a separate household of the Keeper of the Rolls,¹⁵—for just as the Chancellor, originally an official of the king's household, became too great to be a mere domestic officer and so came to have a household of his own for his staff, so too the Keeper of the Rolls, originally an official of the Chancellor's household, likewise acquired his own household,—and since the Master of the Rolls to-day is statutorily responsible for the custody of the national archives housed in the Public Record Office in Chancery Lane, it is interesting to note at how early a date his predecessors were brought into relation with the site on which the modern Record Office stands.

This site is that of the *Domus Conversorum*, the house for converted Jews, which was founded by Henry III in 1232. In 1265 Adam de Chesterton, a Chancery clerk, obtained from the king a licence to lease certain houses in the close of the *Domus Conversorum* and to build others there.¹⁶ In 1307 Adam de Osgodeby, appointed Keeper of the Rolls of Chancery in 1295, was made Keeper of the House of Converts also, and (since the building was seldom fully occupied by its destined inmates after the expulsion of the Jews from England in 1290) established the 'household of the keeper of the Rolls' therein. Subsequently the keepership of the Rolls was separated from the

¹⁴ Calendar of Close Rolls, 1327—1330, p. 371.

¹⁵ Calendar of Miscellaneous Inquisitions, Vol. I, p. 455 [No. 1621].

¹⁶ Close Roll, 50 Henry III, m. 10 d.

keepership of the House of Converts, and for a time the residence of the household of the Keeper of the Rolls is uncertain. It is probable that David de Wollore, Keeper of the Rolls from 1346 to 1371, kept his household in the adjacent Clifford's Inn, the custody of which had been granted to him in 1345.¹⁷

In 1377 the keepership of the Rolls and the keepership of the House of Converts were formally united:—

‘April 11, 51 Edward III (1377).’

In consideration that the House of Converts in the suburb of London, and the chapel, buildings and enclosures thereof, were almost totally ruined when first the king's clerk, William de Burstall, had the keeping thereof, by the negligence of others who had the keeping before him and did not care to dwell there, and that William in his time incurred great expenditure of his own goods on the repair thereof and in making new houses there; the king, in order that the house, chapel, buildings, enclosures and new houses may be fittingly maintained, and at the supplication of the said William, who is now Keeper of the rolls of the Chancery, has granted that after his death the house with its rights shall be annexed to the said office and that the Chancellor or Keeper or Keepers of the great seal shall have power at every voidance of the said office by death, resignation or change of person, to institute successively the Keepers of the rolls in the said house and put them in possession thereof.’¹⁸

From this time the old House of Converts became mainly a depository of the rolls of the Chancery and subsequently,—as being the official residence of the Keeper or Master of the Rolls of Chancery,—was popularly known as ‘The Rolls’.

At a later date, towards the end of the fifteenth or early in the sixteenth century, the keepership of a house with a garden, known as Harflu Inn, situated on the west side of Chancery Lane, almost opposite to the House of Converts and occupied by the Six Clerks of Chancery, was also vested in the Master of the Rolls.¹⁹

¹⁷ Calendar of Patent Rolls, 1345—1348, pp. 13, 26, 57.

¹⁸ Calendar of Patent Rolls, 1374—1377, p. 451.

¹⁹ I myself can remember the house of the Master of the Rolls, which stood, at any rate when I was a boy, where the northern wing of the present Record Office stands, and certainly my predecessor, Lord Romilly, lived there. He lived there and occupied and used the Chapel of the Rolls which is now (not being a consecrated building) the museum of the Record Office, and he worshipped there; but his successor, Sir George Jessel, was a Jew and he did not use it. The Chapel remained until 1893, and I now have the Bible and the Prayer Book which were used in the Chapel, in my own room. It is not a very handy book, for if I did

The records of the Chancery originally accompanied the Chancellor and his staff in his attendance on the king, but as the business of the Chancery increased it would become usual for some of the departmental clerks to remain in London and such records as were not required for current purposes would remain with them. At one time the records of the Chancery were stored in the New Temple, London. An entry in the Close Roll of 20 Edward I relates that in 1291 the Treasurer went to the New Temple and by the king's order broke open a chest, removed certain rolls and sent them to the king, who, with the Chancellor and the Chancery, was then in Scotland. The two rolls were afterwards replaced and the Keeper of the Rolls was given new keys for the damaged chest.²⁰ Soon afterwards the Tower of London became the chief depository of the records of the Chancery. Thus in April, 1337, John de St. Paul, having taken the prescribed oath on appointment as Keeper of the Rolls, was given the keys of the chests in which the rolls, writs and memoranda of the Chancery were kept in the Tower of London, and also the key of another chest at the abbey of St. Mary, York, in which some of the records of the Chancery were then contained.²¹

A subsequent Close Roll gives some interesting particulars of the disposal of the records of the Chancery when Thomas de Evesham was appointed to succeed John de St. Paul in the keepership:—

'Memorandum that on Sunday 2 December [1340] all the rolls, bundles and memoranda of the Chancery which were in the lodging [*hospitio*] of Sir John de Sancto Paulo, then Keeper of the Chancery rolls, sent to the Tower of London by the king's order, were delivered there to Sir William de Kyldesby, Keeper of the Privy Seal, by William de Emeldon, John's clerk, and detained in the Tower in the custody of the said William de Kyldesby until the Wednesday after the Circumcision following, when all the rolls etc., which were in four bags, to wit, those of this year, were delivered to Sir Thomas de Evesham, who took oath to behave faithfully in the office of Keeper of the Chancery rolls, in the presence of Robert de Burghchier, the Chancellor, and

want to look up a text I suppose its size is about 2'6" by 18" and a depth of about 12". I have deposited the communion plate which existed still in my day at the original home of Sir Thomas Plumer, who gave it just about 100 years before. It is now at Sheriff Hutton, in the custody of the vicar and churchwardens of Sheriff Hutton, the home in Yorkshire of the Plumer family.

²⁰ Calendar of Close Rolls, 1288—1296, p. 245.

²¹ Calendar of Close Rolls, 1337—1339, p. 130.

William de Kildesby and others of the Council, at Westminster; and all the other rolls aforesaid remained in the custody of William de Kildesby in the Tower; and on Tuesday following all the said rolls etc. which so remained were delivered to Thomas in 18 bags of canvas and a small leather sack together with a great hamper of divers indentures and the keys of chests in the Tower, in which chests other bundles and memoranda are enclosed.' ²²

Other records of the Chancery were stored in the House of Converts which, as we have seen, came to be the official residence of the Keeper of the Rolls of Chancery. There exists an account for the carriage, in 1376, of rolls to the Tower of London and thence to the House of Converts. ²³ In 1558 a sum of £50 was paid to the then Master of the Rolls 'for so much by him bestowed upon the making of presses to kepe the recordes in the Rolles.' ²⁴

The following references in Pepys' Diary to The Rolls and its Chapel illustrate the business done there and the double function of the chapel as a repository of records and a place of worship:—
11 Feb. 1659-60.

'After that, he [Mr. Chetwind] went to his office in Chancery Lane, calling at the Rolls where I saw the lawyers pleading.'

16 March, 1659-60.

'In my way home I went to the Chapel in Chancery Lane to bespeak papers of all sorts and other things belonging to writing against my voyage.'

16 April, 1665.

'After dinner he [Creed] and I walked to the Rolls Chapell, expecting to hear the great Stillingfleete preach, but he did not, but a very sorry fellow, which vexed me.'

15 March, 1668-9.

'Up and by water with W. Hewer to the Temple; and thence to the Rolls, where I made inquiry for several rolls, and was soon informed in the manner of it: and so spent the whole morning with W. Hewer, he taking little notes in shorthand, while I hired a clerk there to read to me about twelve or more several rolls which I did call for: and it was

²² Calendar of Close Rolls, 1339-1341, p. 657.

²³ Exchequer K.R., Accounts Various, 212/14. I was interested in a country house one day last year to find a red book of 1770, which was a compilation combining some of the merits of Whitaker's Almanack with those of the Red Book, full of addresses. I found a statement in there that the records down to 1483 were kept in the Tower and those since that time were kept in the Rolls Chapel.

²⁴ S. P. Dom. Docquets, vol. i.

great pleasure to me to see the method wherein their rolls are kept that when the Master of the Office, one Mr. Case, do call for them, he did most readily turn to them.'

I confess I was very delighted to find that reference because it is a matter of pride at the Record Office that if one were to ask for any of the Rolls—and we have the Rolls complete from the year of King John, from 1202 down to the present time—one can have the Roll turned up and produced in something like three minutes.

Perhaps while I am speaking of the actual work of the Rolls I may give you this illustration. About two years ago I was sitting at the Privy Council and the question that was before us was whether or not New South Wales had the power to get rid of the Second Chamber before there had been a referendum to the people. We had therefore to go into the question of the original constitution of New South Wales. There was an original Act under which it was given a constitution in 1855. There was a later Act, of 1865, which gave a larger constitution with greater powers. It was an Imperial Act, but it was an Act in the Schedule which had been passed by the legislature of New South Wales, and we found out that the reason why in 1865 a fresh Imperial Act was passed was this: the Act, which was in the Schedule and had purported to be passed by the Colonial legislature, raised doubts whether the legislature had power to pass it, and so it was that the Governor withheld his assent to it and sent home for direction. The matter being of some doubt to lawyers, the obvious and simple way out of it was to accept the Act by putting it in the Schedule, but to give it Imperial force by an Act passed by the Imperial Parliament; but it was not all the Act that was put into the Schedule, and so it occurred to us to ask who it was that had made alterations and how it was that alterations were made. I was sitting at the Privy Council. I sent a note about 11.15 to the Deputy-Keeper—Mr. Stamp—and before one o'clock I had got before me the original Act passed by the Colonial legislature, with alterations in pencil, saying 'Omit this' and 'Omit that,' marked with a 'C,' and we found that the annotator was Mr. Cardwell (afterwards Lord Cardwell), who is well known in reference to the Abolition of the Royal Warrant for Purchase of Commissions in the Army, and who did so much to bring about improvements in our military systems. He was at the time Secretary of State for the Colonies. His was the pencil that marked it.

I had actually the document which had been used and considered in 1865. I need hardly say that the colonial lawyers

who were before us and were taking part in it were deeply interested, nor did they withhold their admiration for the Record Office, which at such short notice was able to produce documents somewhat recondite from the ordinary work of the Office.

In connexion with the storing of records in the Chapel in the White Tower and in the Chapel of the Rolls, it may be of interest to note that it used to be customary to deposit public archives in consecrated places. Among the Greeks the Temple of Apollo at Delos and the Parthenon at Athens were repositories of records, and the Romans also kept archives in their temples. Hardy (in his Introduction to the Close Rolls) calls attention to this practice of antiquity and suggests that in early times the king's archives were generally kept in the king's chapel, so that the Chancellor, as originally an official of the king's chapel, has a natural connexion with the records.²⁵

It would appear that on at any rate one occasion records which had been in the custody of a Master of the Rolls in his lifetime remained in the hands of his family after his death, for in 1898 six Chancery Rolls were recovered by the Public Record Office from Lord Ailesbury, a descendant of a former Master of the Rolls.²⁶

The Keeper or Master of the Rolls was, as explained above, one of the 'Twelve Clerks of the robes' (*ad robas*). The early Close Rolls contain numerous entries relating to gifts of robes to clerks of the Chancery, the robes consisting as a rule of a tunic and an over-tunic. As late as the reign of Edward III the livery supplied to the Masters in Chancery was called 'the king's robes'; *e.g.*:—

'Nov. 22, 1360. Grant for life to the king's clerk, Roger de Chestrefeld, . . . that he shall have the same estate in the Chancery which William de Newenham, late one of the king's twelve clerks of the robes, had while he lived, and that he shall take the king's robes and all other things pertaining to that estate.'²⁷

An illuminated parchment,—apparently part of a MS. law treatise of the time of Henry VI,—now (by the gift of Lord Darling) in the Library of the Inner Temple, shows the process

²⁵ See too the decree of Darius in Ezra, chap. vi, 1 and 2.

²⁶ Commission on Public Records, First Report, Vol. I, Part III, p. 23b (1912) Cmd. 6396. I am afraid that many of the collections we are calendaring under the Historical Manuscripts Commission have percolated into private hands by the failure of the immediate owners to return them to the State when leaving office.

²⁷ Calendar of Patent Rolls, 1358—1361, p. 501.

of sealing a charter in open Court. The bench is occupied by six persons of whom two are clad in scarlet robes trimmed and lined with white. One of these is clearly the Chancellor, the other, seated on his right, tonsured and holding a charter, is almost certainly the Keeper of the Rolls.

I may add, parenthetically, that the Master of the Rolls at the present time buys his own clothes and his own robes.

As well as his robes the Keeper of the Rolls received also an allowance for diet, and the old-established allowances for diet and robes can be traced year by year for several centuries with little variation: *e.g.* among the Declared Accounts of the Audit Office for 1826 we find:—

‘The Right Honble Robert Lord Gifford, Master of the Rolls, for his summer robes due at Pentecost 1825, £4; and for his winter robes due at Christmas, 1825, £4 14s.’²⁸

In addition to an official residence and allowances for diet and livery the Master of the Rolls had a share of the fees and fines payable in Chancery. Among the Lansdowne MSS. in the British Museum is a paper, dated 1614, in which these fees and fines are set out. They include, among other receipts, £900, ‘the moytie of the casuall fynes payed by the cursitors upon originall writtes’; £400 for ‘fees due for severall busynes in the Pettie Bagge’; and £200 for ‘fees due from Clerkes of the Chappel.’ The total sum is £2,380. This appears, however, to have been an exaggerated estimate, for the paper is minuted in a hand probably that of Sir Julius Caesar, Master of the Rolls (1614—1636): ‘Thus the proverb is verified: He that accompts without his hoast must accompt again: this excedeth truth by much: for I found it but at 2,200 *lib.* or thereabouts in my first yere and since abated by little and little, so that this last yere it amounted but to 1,600 *lib.* or thereabouts, and no more in 1631.’

The Swainmote Court Rolls of Windsor Forest [8/151] contain a reference to what may have been a perquisite of the Master of the Rolls in an entry relating to ‘one bucke killed by the Master of the Rolles,’ in September, 1613.

There were other and less creditable sources of income. The Master of the Rolls had the sole right of appointing the Six Clerks of the Chancery, the three Clerks of the Petty Bag, the two Examiners, the seven Clerks of the Rolls Chapel, and the Usher, the Crier and the Doorkeeper of the Court of Chancery, and in the earlier part of the seventeenth century most of those

²⁸ A. O. Declared Accounts, bundle 1420, No. 380.

officials had to pay him for their places. Thus Lord Bruce, who was Master of the Rolls from 1603 to 1611, received £12,000 for three of the Six Clerkships vacated by death and £2,200 for three others vacated by surrender.²⁹ To check such abuses it was ordained, in 1654,

‘That neither the Lord Chancellour, Lord Keeper, Lords Commissioners of the Great Seal, Master of the Rolls, nor any officer of the said Court [of Chancery] shall either directly or indirectly take or receive any sum or sums of money, gratuity or reward, for nominating or admitting of any person or persons to any office or place within his or their disposition in the said Court, upon pain of losing his Office and paying double the sum or value of the gratuity or reward so received.’³⁰

The Master of the Rolls was made independent of fees in 1837, by statute 1 Vict. c. 46, section 1 of which gave him £7,000 a year free of all taxes and deductions whatsoever, which makes my mouth water. This Act and one of 1838 (1 & 2 Vict. c. 94) between them consolidated the general position of the Public Record Office and the Master of the Rolls.³¹

The Master of the Rolls was then Lord Langdale. No doubt we owe much to the manner in which he carried out his duties and the way in which all documents which were placed under his superintendence were kept in one place. The present Record Office was built and opened in 1856. We have had Masters of the Rolls who have held office for long periods. There was Lord Romilly, for over twenty years, from 1851-73, and Lord Esher, from 1883-97, and we have had Deputy Keepers like Sir Maxwell Lyte, who was Deputy Keeper for forty years; and they have brought order out of chaos.

I have always been interested in a rather pathetic letter which was written in the time of Charles II to Sir Harbottle Grimston, then Master of the Rolls. It ran as follows:—

‘Sir,

the oportunity of this bearer gives me occasion to informe yor Hon^r, y^t whiles you are sucking in the fresh country ayre, I have been almost choaked wth the dust of neglected Records (interred in their own rubbish for sundry years) in the White Tower, their rust eating out the tops of my gloves wth their touch, and their dust rendring me twice a day as blacke as

²⁹ Lansdowne MSS. 163, f. 346.

³⁰ Sanders, *Orders in Chancery*, p. 267.

³¹ S. 1 of the Act of 1838 gives the M.R. custody of all ‘records’ as defined by s. 20.

a chymny-sweeper. I have at last tumbled y^m all over and distributed y^m into sundry indigested heapes, w^{ch} I intend God willing to reduce into order by degrees. I have discovered about 94 severall parcels of Parliam^t writs of so^mons broken and scattered asunder from each other, w^{ch} I have reduced into bundels and filed in an alphabeticall maner according to the counties, wherein are sundry rarities: I have likewise as many Bundels of Procurations of the Clergy and Billes in Parliam^t (of w^{ch} there was never known or extent before) and as many or more bundles of Petitions and other writs and records relating to Parliam^t, whereof there were no memorials in the office before. Besides these there are sundry Plea Rolls, Essoyn Rolls, and infinite Bundels of originell and judiciell writs in all the Courts of Westm^r, w^{ch} I have throun together; many hundreds of Bills, Answers, replications and proceedings and pleas in Chancery in English and Latin in the raynes of Rich. 2, H. 4, 5, 6, and Ed. 4 (thought to be lost) many treatises wth foreign Kings and States, many originall Popes Bulls³² some under leaden seales and other rarities w^{ch} I have raised from the grave of oblivion. The work was so filthy and unpleas^t, y^t Mr. Rily and others weill not foul their hands and cloaths, nor indanger their healths to assist me in it. Having despatched the difficultest and filthiest part thereof and severed all these neglected Records into distinct heapes till I can particularly peruse y^m, I am now resolved to take the ayre of my owne cuntry (where I have not been these 2 years) for 3 weekes space and yⁿ resolve to proceed wth the cleansing of my Augean stable and reducing the Records into order. If yo^r Hon^r please to order yo^r Clerkes of the Rolls to file the writs of Parliam^t and their returnes into an Alphabeticall maner according to the counties and to make a Kalender to y^m this vacation (they being not a qter so many as I have handled and digested into order in 3 weekes space) it wilbe a usefull worke, and the best meanes to preserve them they now lying in confused heapes, and the Clerkes and others being inforced to search over the whole bundle for every particular Indenture and returns that Clients inquire or search after. I intend God willing on Thursday morning next to take coach for the cuntry and if I live till the term shall give you a further account of my proceedings in the premises. In the

³² The Public Record Office has a Bull of Julius VII with a Golden Bull or Seal to it, under which the King holds the title of Defender of the Faith.

meantime presenting my humble services to yor Honor and yor Lady, and wishing you all happiness, I take my leave and remain,

Yor Hon^{rs} humble serv^t
and affectionate Frend,
WM. PRYNNE.

Lincolnes Inne

Sept. 9, 1661.

Endorsement.

To the Hon^{ble} his honored Freind Sir Harbottle Grimston kn^t and Baronet, Mr of the Rolls, at Verulam,
present these.'

That letter was written in the days of Charles II, and I was delighted to find that it was preserved among the Muniments at Hertford, where Sir Harbottle Grimston had his home.³³

Development of the Chancery as a Court of law and equity.
—The Keeper, or Master, of the Rolls of Chancery was associated with the Chancellor in judicial as well as administrative duties, and with the development of the jurisdiction of the Chancery many of the duties that attached to the office of Master of the Rolls in connexion with the custody of records were, in the course of time, delegated to deputies appointed by him, *i.e.* to a Keeper of Records in the Tower of London and to similar officers at the Rolls. An example of historical continuity is afforded by the fact that the permanent head of the Public Record Office is styled the Deputy Keeper of the Public Records.

³³ Herts County Muniment Room, Gorhambury Documents, VIII, B. 157. Prynne's appointment to his office appears in the following letter (VIII, B. 159):
Charles R.

Trusty and Welbeloved, Wee Greet you well, and do hereby signify Our Royall will and pleasure unto you, that (as much as in you is) you give and grant unto Our Trusty and Welbeloved William Prynne of Lincolnes Inne in Our County of Middlesex Esqr the office of Clerk or Keeper of Our Rolles and Records within Our Tower of London, and also the custody of Our Tower Chamber house and place where the said Rolls and Records used to lye, together with all wages, fees, profits, priviledges and advantages to the said Office belonging, during the terme of his naturall life, in as ample manner as the same was formerly granted by Sir Edward Philipps [M.R. 1610—1614; his name is also spelled Phelipps] late Master of Our Rolls unto John Burroughs and Nicholas Parker Esq^{rs}. And wee do hereby declare, that wee will approve of, ratify and confirme the same under our great seale of England. And so wee bid you farewell. Given at Our Court at Whitehall the sixt day of May, 1665 in the seventeenth year of our Reigne.

By his Maties Comānd
Will Morice.

To Our Trusty and Welbeloved
Sir Harbottle Grimston Bart.
Master of the Rolles of Our
Court of Chancery.

and is appointed by the Master of the Rolls, subject to a Royal Warrant of Approbation.

One of the duties of the staff of clerks over which the Chancellor presided was to draw up and issue the writs of course whereby actions were begun in the Courts of law. Each form of action had its appropriate writ, *tot erunt formulae brevium, quot sunt genera actionum*, as Bracton said (f. 413b), but the Chancery had also a limited power, authorized by the Second Statute of Westminster, of issuing writs *in consimili casu*. There was, moreover, another way by which the Chancellor was brought into contact with the administration of justice. After the emergence from the undifferentiated *Curia Regis* of the three great Courts of law, the Courts of King's Bench, Exchequer and Common Pleas, there was held to be still a reserve of justice in the king. Those who cannot find a remedy at the Common Law make petition to the king and his council. The Chancellor is a member of the council (and the most learned member) and the task of dealing with these petitions falls largely on him. Moreover the petitions ask for relief as a matter of conscience and the Chancellor is the keeper of the king's conscience. It is natural therefore that such petitions should be referred to him, and at length, in the course of the fourteenth century, it becomes the practice to address petitions, or 'bills' as they are called, directly to the Chancellor. The subsequent procedure, as one would expect—the Chancellor being an ecclesiastic—resembles that of the Canon Law rather than that of the Common Law. A writ is issued, but it is the writ of *sub poena*, returnable not in a Court of Common Law but before the Chancellor himself, and it bids the party complained of come and answer to the complaint made against him, before the Chancellor, on oath. Such was the origin of the Chancery as a Court of Equity. The Chancery had also a Common Law side (wherein procedure was by Latin bill, as distinct from procedure by petition, or English bill), but this side never formed a very important part of its jurisdiction.

It is probable that from the first a share of the judicial duties of the Chancellor fell upon the Master of the Rolls, both as a Master in Chancery and also as the official to whom the Great Seal was from time to time committed, during a vacancy or in the absence of the Chancellor. In 1433, during the absence of the Chancellor in France, the Great Seal was entrusted to the then Master of the Rolls, who was commissioned to exercise the jurisdiction belonging to the Court of Chancery. Accordingly, on the Close Roll of that year [11 Henry VI], there is enrolled a memorandum that 'on 22 April [1433] John Franke, clerk,

keeper of the chancery rolls, received from John Stoppyndoun, clerk, on behalf of the Chancellor the great seal of silver,³⁴ to occupy and use as directed in a writ of the king whereby the king commands the said John to receive the same; . . . since it is the king's will that in the Chancellor's absence there shall be no delay in justice and of the execution of the laws, customs or statutes of the realm.'³⁵ In a volume of extracts from the Year Books recently published by the Selden Society,³⁶ the Clerk of the Rolls is mentioned, in a case dated 35 Henry VI, as being present with the justices discussing a point of law in the Exchequer Chamber, and there is a note³⁷ to the effect that there are other references in the Year Books to the presence of the Master of the Rolls in what Coke called 'the assembly of all judges of England for matters in law.'³⁸

The earliest reference in a statute to the judicial duties of the Master of the Rolls is 11 Henry VII, c. 25, wherein the Clerk of the Rolls is mentioned as one of the judges empowered to hear complaints of perjury.

The first volume of 'Calendars of Proceedings in Chancery in the reign of Elizabeth,' published by the Record Commission in 1827, contains by way of preface a number of proceedings in earlier reigns. One of these, assigned to the reign of Henry VI, the case of *Godard v. Ridmynton*, consists of a bill addressed to 'my full honorable and right worshipfull maister, my mayster the Clerke of the Rolls.' Another, assigned also to the reign of Henry VI (*Mathew v. Oxenbrigge*), consists of 'the poyntes and articles' submitted by the plaintiff for the defendant's examination thereon before the Master of the Rolls, together with the text of the defendant's answers. The first of these proceedings suggests that the Master of the Rolls was probably acting in the place of the Chancellor. With regard to the second, the examination of parties, personally and on interrogatories, appears from early times to have been the special business of the Master of the Rolls by virtue of his position as a Master in Chancery,³⁹ and up to the time of Henry VIII the jurisdiction of the Master of the Rolls, save when acting as Keeper of the Great Seal, appears to have differed from that of

³⁴ There was also a Great Seal in gold, but the silver seal was used for the dispatch of ordinary business [Cal. Close Rolls, 1429—1435, p. 181].

³⁵ Calendar of Close Rolls, 1429—1435, p. 241.

³⁶ Select Cases in the Exchequer Chamber, 1933, p. 140.

³⁷ *Ibid.* p. xvi.

³⁸ Coke in fact refers to four Courts which held their sittings in the Exchequer Chamber, but the Proceedings reported in the Year Books refer only to the Court so described by him (Fourth Institute, c. xiii, p. 119).

³⁹ Spence, Equitable Jurisdiction, i, 363, note.

the other Masters in degree rather than in kind.⁴⁰ However, during the Chancellorship of Wolsey, Tunstall (M.R. 1516—1522) was commissioned as a regular judge to hear causes in Chancery, and this practice in time gave the Master of the Rolls a jurisdiction different from that of the other Masters in Chancery.

The practice of addressing commissions to the Master of the Rolls empowering him to hear cases became so usual that Coke⁴¹ states generally that in the absence of the Lord Chancellor he hears causes and makes orders. He came in fact to be the general deputy of the Lord Chancellor.

It was, however, disputed whether the Master of the Rolls exercised these powers by virtue of his position as a Master in Chancery, or by virtue of the special commissions from time to time addressed to him. From the '*Renovacio Ordinum Cancellarie*' (to which reference has been made above), it appears that, *temp.* Henry V, the Keeper of the Rolls, or one of the twelve Masters,—on the petition of counsel, or a party, or an attorney of a party,—might, in the absence of the Chancellor, dispose of applications relating to procedure, but might not make any definite order; that being reserved for the Chancellor or Keeper of the Great Seal.⁴²

Among the Lansdowne MSS. [No. 163, f. 95] is a paper, quoted by Sanders,⁴³ with various notes on the office of Master of the Rolls. The paper is endorsed by Sir Julius Caesar (M.R. 1614—1636), 'Valence for the Rolls, 36 r.r. Elizabeth. Delivered in writing by old Mr. Valence of Lincoln's Inn to the Master of the Rolls, Sir Tho. Egerton and by him to mee at my first coming to bee Master of the Rolles.' One of the notes is to the effect that 'the Masters of the Rowles of ould tyme did onelye but as Masters of the Chancerye assiste the courtes.' Another states that 'Sir Nicholas Bacon (Lord Keeper 1558—1579) after Sir William Cordell (M.R. 1557—1581) had ordered any cause was wont to add this clause—*This was ordered in my absence.* Such was his hard affection towards that worthy man.'

The controversy came to a head in the eighteenth century. A certain Mr. Burroughs in 1726 wrote a book entitled 'The History of the Chancery relating to the Judicial Power of that Court and the Rights of the Masters,' in which he maintained that the judicial authority of the Master of the Rolls was

⁴⁰ Holdsworth, *Hist. of Eng. Law*, i, 419.

⁴¹ 4 *Inst.* 97.

⁴² Sanders, *op. cit.* 7d.

⁴³ *Ibid.* 17, 18.

exercised only *qua* Master. In 1727 a reply appeared entitled 'A Discourse of the Judicial Authority belonging to the Office of Master of the Rolls in the High Court of Chancery.' This was published anonymously but is generally attributed to Philip Yorke, afterwards Lord Hardwicke, and Sir Joseph Jekyll, M.R. Burroughs replied with his 'Legal Judicature in Chancery,' and the question was at length settled by statute in 1729 (3 Geo. 2, c. 30), by which it was enacted that all orders made by the Master of the Rolls (except such orders as the Lord Chancellor alone could make) should be valid, subject to an appeal to the Lord Chancellor.

Meanwhile the Master of the Rolls had long ceased to be the actual keeper of the records of the Chancery, having, as we have seen, delegated the duty to his deputies. However, as I have said, the Act of 1837, and a subsequent Order in Council of 1852, gave him the legal custody, or charge and superintendence, of the national archives.

Since the first Historical MSS. Commission in 1869 the Master of the Rolls has acted as Chairman of the Commission.

Under the Judicature Acts, 1875 and 1881, and the Appellate Jurisdiction Act, 1876, the Master of the Rolls now sits (with the Lords Justices) as President of the Court of Appeal. The Master of the Rolls was formerly eligible to a seat in the House of Commons, but Sir John Romilly, appointed Master of the Rolls in 1851, was the last to enjoy this privilege, which was abolished by the Judicature Act, 1873.

I have followed out—perhaps imperfectly—the history of the Master of the Rolls, both in his functions as Keeper of the Records, and also his judicial functions. You may be wondering how the Master of the Rolls has in late years come, so to speak, into full flower in making speeches and looking after documents in various counties. That arises in this way: in the Law of Property Act, 1922, one of the Birkenhead Acts, it was determined that there should no longer be a tenure by copyhold. You will remember that tenure by copyhold prevailed in the old days when manors were flourishing. The lord of the manor had a court, and from time to time, when changes were made in the tenure of land, land which passed by custom from father to son, entry of the new tenant was made upon the roll of the court and the tenant was given a copy of the court roll as indicating his title.

When it was determined to bring to an end the system of copyhold tenure, someone conceived that there might be a great number of documents and books which had been used in the

working of manor courts, which would no longer be useful and yet would be of interest, interest both from a social and archaeological and from, I may say, a financial point of view, and so it was that you will find that a clause was put into an Amending Act of 1924, Second Schedule, s. 2, whereby it was provided that all manorial documents should be under the charge and superintendence of the Master of the Rolls. Now the manors were to come to an end in the course of ten years, and he has this effective power—that if he is not satisfied with the existing depository he can order that they be brought into the Public Record Office.⁴⁴

That enabled us to take steps whereby it is not possible now to sell those manorial records overseas. We established a committee for the purpose of looking after the manorial rolls and I have had the great pleasure of visiting a large number of counties in England and declaring some place like a library or a museum or other public building a suitable depository for the manorial documents, and by the goodwill and zeal of persons in their own counties the result has been that for all the counties in England we have now got a place where the manorial documents are being stored and preserved, and more than that, are being calendared, and in many cases where an archivist is being employed to set them all in order and to find the treasures which undoubtedly do exist in them. That extra duty has fallen upon the Master of the Rolls, and it has been a great opportunity, which I have welcomed, because in 1910 when there was a Royal Commission to inquire into the state of Public Records they all suggested that there should be some sort of a public record office in the counties, but it is quite obvious that that would be a very expensive thing to establish and by no means easy to carry out. On the other hand there were a great number of museums, libraries, and public places in the various counties, to which persons who were living in the counties would willingly send their documents, subject to the right of access to them if they required it. That spirit has been quickened by the duty which has been cast on the Master of the Rolls, and the whole movement has been one of striking success. I think it may be said that in every county there has been a determination and a desire that not merely manorial documents, but all documents of interest in the counties, should be collected and placed on public exhibition. It is on that account that I went down to Hertford and found that interesting letter written by William Prynne; in that way, also, we have

⁴⁴ Under this Act rules have been issued by the M.R. providing in fuller detail for custody of such documents: Stat. Rules and Orders, 1925, No. 1310/L.49.

been down to Dorchester and found a good deal of interest, including somewhat gruesome references to the Bloody Assize; and the same at Taunton. I am going to Stafford in March to the William Salt Library. I have been to Bedford where one can turn up the entry of the baptism of John Bunyan and see a wonderful collection of documents. These things have been collected because they are of the deepest interest in the locality.

My office, as I say, is a very old one. The series of records that we have got is second to none in any other country. We have the means of getting at them and offering access to them to all who like to come, and I look back on the work that has been done and look forward to the work that will be done, as one of deep interest to all those who care not only for our own time, but who are proud to trace the origin of our race and look forward to the amplitude which that race will achieve in the future.

SIR EDWARD COKE.¹

SIR WILLIAM HOLDSWORTH.

COKE and Bacon, the two greatest lawyers of the late sixteenth and early seventeenth centuries, were members of Trinity College. Bacon was the greatest jurist of his day. Coke was the greatest of our common lawyers. I account it a great honour that Trinity College should in 1926, the tercentenary of Bacon's death, have asked me to say something of Bacon as a lawyer, and that in this year, 1934, the tercentenary of Coke's death, it has asked me to give this lecture.

It is very fitting that Trinity College and Cambridge University should commemorate Coke. He himself never forgot the two institutions to which he owed his education—the Inns of Court and Cambridge University. He said of the Inns of Court that they were 'the most famous Universitie for profession of law only, or of any one human Science that is in the world'²; and he took occasion to praise his own and Oxford University in *Dr. Bonham's Case*.³ That case turned upon the question whether the College of Physicians had exceeded its powers in fining and imprisoning Dr. Bonham, a Cambridge doctor of philosophy and physic, for practising as a doctor without a licence from the College. Coke thought that much had been said in commendation of the College, and somewhat in derogation of the doctors of the Universities of Cambridge and Oxford. He therefore said from the bench that 'no comparison was to be made between that private College and either of the Universities of Cambridge and Oxford,' which were 'the eyes and soul of the realm, from whence religion, the humanities, and learning were richly diffused into all parts of the realm.'⁴

In this lecture I propose, in the first place, to deal very briefly with the events of Coke's life; in the second place to say

¹ A lecture given before the University of Cambridge, by invitation of the Master and Fellows of Trinity College, on Oct. 20, 1934, on the occasion of a tercentenary commemoration of Sir Edward Coke, who was admitted a member of the College in 1567.

The authorities for most of the statements in this lecture will be found in my *History of English Law*, vol. v, 425-93. I have not therefore thought it worth while to insert detailed authorities for all my statements.

² 3 Co. Rep. Preface.

³ (1610) 8 Co. Rep. 113b.

⁴ At f. 116b.

something of his writings; and, in the third place to give some account of the great influence which his career and writings have had upon the future development of English law.

THE EVENTS OF COKE'S LIFE.

Coke's career falls into three well-marked periods. The first extends to his appointment to the bench in 1606, the second to his dismissal from the bench in 1616, and the third to his death in 1634.

Coke was born February 1, 1552. He was educated at Trinity College and the Inner Temple, and was called to the bar April 20, 1578. Owing to his own industry and learning and to the patronage of Burghley, his rise was rapid. On June 12, 1592, he became Solicitor-General; on February 19, 1593, Speaker of the House of Commons, and on March 24, 1594, Attorney-General, which post he held till 1606. As a law officer of the Crown he was an officer of state as well as a lawyer. The fact that he had been an officer of state during this period left a lasting mark upon his intellectual outlook. Hatred of Roman Catholics, reverence for the Crown, brutality to prisoners charged with treason or sedition, were characteristics which came naturally to many Englishmen who had lived through that period of national emergency; and more especially to those who, by reason of their official positions, knew the dangers to which the Queen and State were constantly exposed. In Coke, whose enthusiastic temperament often led him to unfortunate extremes in thought and action, these characteristics appeared in an exaggerated form, and resulted in so ferocious a treatment of the prisoners whom he was called upon to prosecute, that even his contemporaries were occasionally disgusted. On Raleigh's trial Cecil interposed to check Coke. 'Good Mr. Attorney,' he said, 'be not so impatient. Give him leave to speak.' To which Coke replied that he was encouraging traitors, and 'sat down in a chafe, and would speak no more, until the Commissioners urged and entreated him.'⁵ His experiences as law officer also led him to approve of acts and doctrines which he later denounced as unconstitutional—such acts as the infliction of torture,⁶ such doctrines as the validity of benevolences and impositions,⁷ of commitments by the Council,⁸ and of the practice

⁵ (1603) 2 S. T. at p. 26.

⁶ As Attorney-General he had prepared documents to authorize its application: Spedding, *Bacon's Letters and Life*, v, 93 n., vii, 78, 79; cp. *Third Instit.* 35; Holdsworth, *H. E. L.* v, 185.

⁷ *Ibid.* 427, nn. 4 and 5.

⁸ *Ibid.* 450, n. 9.

of asking the judges to give extra-judicial opinions.⁹ But neither then nor at any other period in his life did he waver in his belief that the common law was a well-nigh perfect system, upon which not only the public and private rights of Englishmen depended, but also the very being of the English state.

When, therefore, in 1606 he became Chief Justice of the Common Pleas, he obtained a post which was entirely congenial to him; for he could enforce from the Bench his ideas as to the position of the common law. But these ideas assorted badly with the claims of rival Courts, such as the Star Chamber, the Court of Chancery, and the Court of Admiralty; and they assorted even worse with the claims of James I to decide all conflicts of jurisdiction, and with his views as to the position of the prerogative in the state. According to Coke's view, the common law was the supreme law in the state, and the judges, unfettered and uncontrolled save by the law, were the sole exponents of this supreme law. According to James I's view the judges were, like other civil servants, the officers of the Crown. The Crown could supersede them if necessary and decide the matter for itself. The prerogative was in the last resort supreme. It was inevitable, therefore, that Coke's tenure of the judicial office should be marked by a series of conflicts with the king, which defined the issues between them, and paved the way for Coke's alliance with the Parliamentary opposition. Between 1606 and 1613 there were a series of such conflicts on such subjects as the sphere of the jurisdiction of the ecclesiastical Courts and of the Councils of Wales and the North, the claim of the king to withdraw cases from the Courts and to decide them himself, the proper sphere of Proclamations.

James I was angry with Coke; but he was conscious that he must be careful how he dealt with him. Personally Coke was not unpopular at court—Prince Charles is said to have delighted in his conversation. And it was clear that his fanatical reverence for the common law was the reflection of a deep-seated national feeling. The arguments used by the leaders of the Parliamentary opposition encouraged the belief that in the common law there was a store of principles, which demonstrated the illegality of such exercises of arbitrary power as the imposition of extra customs duties, and commitments to prison by orders of the king. Coke's conduct on the bench had, it seemed to many, proved the truth of this belief. Therefore the fact, that he, the greatest master of the common law, had demon-

⁹ *Ibid.* 428, n. 1.

strated from the bench that the common law was the greatest safeguard against arbitrary power had given him immense popularity.

In 1613 James I, on Bacon's advice, transferred Coke from the Chief Justiceship of the Common Pleas to that of the King's Bench. Probably Bacon thought that if he were removed from a Court which was specially concerned with safeguarding the rights of the people, to a Court where his special concern was to look after the rights of the king, his capacity for harm would be diminished. Bacon's advice showed some insight into Coke's character. Coke had the mind of an advocate, and would fight with all his strength for a cause which he was retained to defend. But Bacon had not appreciated the fact that Coke's views as to the supremacy of the common law had become a settled belief not devoid of fanaticism. The result of his removal to the office of Chief Justice of the King's Bench was therefore very different from that which Bacon had expected. His three years' tenure of the office was marked by three quarrels with the king, the most famous of which was his dispute with Lord Ellesmere as to the jurisdiction of the Court of Chancery, in which, with James I's help, Lord Ellesmere came off victorious. On June 26, 1616, he was suspended from the Privy Council, forbidden to go on circuit, and ordered to spend his leisure in revising and correcting his reports; and on November 14, 1616, he was dismissed.

From 1616 to 1620 Coke had some hopes that he might be restored to favour. The marriage of his daughter to Sir John Villiers seemed to promise some help from the all-powerful Buckingham. But James was too conscious of the hopeless difference between his own and Coke's political views ever to trust him again with an important office. In the Parliament of 1620 Coke allied himself with the Parliamentary opposition. That was a momentous step, which had large consequences both for Parliament and for the common law. It cemented the old standing alliance between Parliament and the common law; it enlisted in favour of the Parliament that superstitious reverence which men felt for the common law; and it strengthened that note of legal conservatism which is the distinguishing characteristic of the constitutional struggles of the seventeenth century, and the secret of their successful issue. In the Parliaments of 1620, 1624, 1625, and 1628 Coke was a leader of the Parliamentary opposition. It was in his last Parliament—the Parliament of 1628—that he did his most important work for the constitution; for it was in that Parliament that he took the largest part in framing and in carrying the Petition of Right—

the first of those great constitutional documents since Magna Carta, which safeguard the liberties of the people by securing the supremacy of the law. Throughout his life Coke had held that the common law was supreme, and that it only needed to be clearly declared to be all sufficient to safeguard the rights of Englishmen. The placing on the Statute Book of a declaratory measure which embodied both these ideas was a fitting crown to his career.

The six remaining years of his life were spent in retirement. But he was naturally an object of suspicion to Charles I, who had embarked on his scheme of prerogative government. In 1631, Charles, hearing that he was about to publish a book, ordered the Lord Keeper to stop its publication. The reason which he gave for his action is the best evidence of the great reputation which Coke had acquired. 'He is held,' he said,¹⁰ 'too great an oracle amongst the people, and they may be misled by anything that carries such an authority as all things do that he either speaks or writes.'

At first sight it may seem that there is a great inconsistency in Coke's career. At first sight it may seem that there is little in common between the Attorney-General of Elizabeth and James I who was zealous in the defence of the prerogative, and the Chief Justice who became the leader of the Parliamentary opposition in James I's and Charles I's Parliaments. I think this inconsistency is resolved if we remember that Coke, throughout his life, had the outlook of a Tudor lawyer and statesman, and a Tudor lawyer and statesman of the Elizabethan Age. Bishop Gardiner tells us that Thomas Cromwell had once asked him in the presence of Henry VIII whether the maxim *quod principi placuit* did not apply to the king of England—an awkward question in such a presence; and that he had replied: 'I had read indeed of kings that had their wills always received for a law, but I told him the form of his reign, to make the laws his will was more sure and quiet, and by this form of government ye be established, and it is agreeable with the nature of your people.'¹¹ This was the principle upon which both Henry VIII and Elizabeth acted; and it recognizes the supremacy of the law. Obviously much latitude could be allowed to a prince who recognized this principle, more especially in a time of national emergency. But equally obviously the same latitude could not be allowed to a prince in whose book—The True Law of Free Monarchies—is to be found, as Figgis

¹⁰ S. P. Dom. 1629-31, 490, clxxxiii, 18.

¹¹ 1 S. T. 588.

has said, the doctrine of the divine right of the king 'complete in every detail.'¹² Coke was bound to resist an attempt by the king to enforce this theory, and to substitute the supremacy of the Crown for the supremacy of the common law; and his resistance inevitably led to an alliance with the Parliamentary opposition.

The character of the man and his age fully account for his vast influence upon the law and politics of the seventeenth century. But they do not account for the permanence of his influence upon the future development of English law. The permanence of that influence is due to the fact that his devotion to the common law led him to consider it to be his duty¹³ to employ the scanty leisure of his busy career in restating all its principal doctrines. Therefore, in order to understand the reasons for Coke's permanent influence on the future development of English law, we must examine the character of his writings.

COKE'S WRITINGS.

Coke was a master of the literature of the law in print and in manuscript; and his reading was not confined to law books. On points of medieval history he can cite Matthew of Paris¹⁴; and he had read Camden and Lambard¹⁵—the principal historians of his own day. He can contrast the civil and canon law with the common law¹⁶; he can enliven his text by references to Virgil,¹⁷ Horace,¹⁸ and Chaucer¹⁹; and he can illustrate a point by a citation from Tacitus,²⁰ Cicero,²¹ or the Vulgate.²² But it must be admitted that of non-professional books and of non-professional branches of knowledge he had no critical knowledge. He accepted the information which he derived from them with a credulity which is as medieval as his law. He was inclined to accept all the legends about Brut; he was convinced that the ancient Britons talked Greek²³; and he accepted all the legends told by the author of the *Mirror of Justices*.²⁴ There

¹² Divine Right of Kings, 136.

¹³ 8 Co. Rep. Pref. xxxiv, cited Holdsworth, H. E. L. v, 456, n. 2.

¹⁴ Co. Litt. 43a; Second Instit. 15.

¹⁵ 10 Co. Rep. Pref.; Co. Litt. 168a; Fourth Instit. 63.

¹⁶ Co. Litt. 102a, 262a, 352b, 368a; 10 Co. Rep. Pref. xvii.

¹⁷ Co. Litt. 165; Fourth Instit. 289.

¹⁸ Co. Litt. 141.

¹⁹ Second Instit. 123.

²⁰ Fourth Instit. 129, 244.

²¹ *Ibid.* 129; *Foster's Case* (1615) 11 Co. Rep. 60a.

²² Second Instit. 53, and many other passages.

²³ 3 Co. Rep. Pref. viii—x.

²⁴ 9 Co. Rep. Pref. i—v.

is no doubt that Coke's credulity has been injurious to legal history, because succeeding lawyers did not distinguish between those parts of his work which rested on the solid authority of statute, record, Year Book, or report, and those which rested on his own uncritical acceptance of historical legends.

No one can contend that Coke's writings are literature. But they have some literary qualities. He was a skilful pleader; and to be a skilful pleader exactness of expression was essential. He was a skilful advocate; and to be a skilful advocate lucidity of expression was essential. He could arrest attention by a pointed expression—'good pleading,' he said,²⁵ 'is the heart-string of the common law'; by a fine phrase—'the gladsome light of jurisprudence'²⁶; or by a striking metaphor—'the laws of England are the golden metwand whereby all men's causes are justly and evenly measured.'²⁷ Though his style is often verbose, it is never obscure; and, when he is fired by his theme, he rises to real eloquence—one illustration is his summary of the manner in which the Tudor statesmen had settled the vexed question of the status of the copyholder:

'But now copy holders stand upon a sure ground, now they weigh not Lord's displeasure, they shake not at every sudden blast of wind, they eat, drink, and sleep securely; oneiy having an especial care of the main chance (viz.) to perform carefully what duties and services so-ever their Tenure doth exact, and Custome doth require: then let Lord frown, the copy holder cares not, knowing himself safe, and not within any danger. For if the Lord's anger grow to expulsion, the Law hath provided several weapons of remedy; for it is at his election either to sue a *Subpoena* or an action of trespass against the Lord. Time hath dealt very favourably with Copy-holders in divers respects.'²⁸

Coke wrote many books—Readings, a large book of Entries, a little treatise on Bail and Mainprize, and, the best of all his shorter works—his *Compleate Copy-Holder*. By far the most important of his works, because they have influenced the whole future development of English law, are his Reports and his Institutes. The first part of Coke's Reports was published in 1600, and the second and third parts shortly afterwards. The remaining eight parts appeared at short intervals between 1603 and 1615. The twelfth and thirteenth parts were published

²⁵ Co. Litt. Pref.

²⁶ Co. Litt. Epilogue.

²⁷ Fourth Instit. 240.

²⁸ Coke, *Compleate Copy-Holder*, § 9.

after his death in 1655 and 1658. They were not prepared by him for the press and are, for the most part, simply notes of cases and other transactions in which he had been engaged. They are valuable as evidence of some of the facts of Coke's life, and of the evolution of his political views. But, though they contain some leading cases in constitutional law, *e.g.* the *Case of Proclamations*, they have never had the same authority as that possessed by the first eleven parts of the Reports which he himself published.

In Coke's day there was no agreement as to the form which a report should take. Coke's reports are written in all sorts of forms. Sometimes he makes the case a mere peg on which he hangs his summary of the law on a particular topic.²⁹ Sometimes he reports a series of cases on a particular topic very concisely.³⁰ Important cases he reports elaborately and at length.³¹ He often intervenes to insert comments or advice of his own; and there is no doubt that he sometimes added much from his own reading. Bacon once said that in his reports there was too much *de proprio*³²; and the writer of the Observations on his Reports is even more severe.³³ The cases reported form a corpus of the common law, civil and criminal. All parts of the law are reviewed; the old learning is restated; and the manner in which it has been modified by more recent statutes and cases is explained. Thus, such new developments of the common law as the struggle against perpetuities, the development of the action of assumpsit, the new practice of hearing actions on contracts made abroad, are noted and justified.³⁴

The great developments of the common law, to which the Reports bear witness, had raised the problem of how this modern common law, which was arising on the foundations of the medieval common law, was to be taught to students. Since the older books had become inadequate, Coke set himself to supply the want of an up-to-date treatise by writing four books of Institutes.

The first Institute—Coke upon Littleton—is very different in character to the other three. It was meant to be Littleton brought up to date. But it is a great deal more than this. All

²⁹ *E.g.* *Arthur Blackamore's Case* (1611) 8 Co. Rep. 156a; *Beecher's Case* (1609) 8 Co. Rep. 58a.

³⁰ *E.g.* 4 Co. Rep. 21a—32a (copyhold cases); *ibid.* 39b—48a (appeals and indictments).

³¹ *E.g.* *Shelley's Case* (1579-81) 1 Co. Rep. 88b.

³² Spedding, *Letters and Life of Bacon*, v, 86.

³³ For this document, which has been attributed without much positive evidence to Lord Ellesmere, see Holdsworth, *H. E. L.* v, 478, n. 1.

³⁴ Holdsworth, *H. E. L.*, v, 465, nn. 1—4.

matters mentioned by Littleton are explained and commented upon and a great many that are not; for all Coke's reading, and all his experience as counsel and judge, went to its making. It is in fact a legal encyclopaedia arranged on no plan except that suggested by the words and sentences of Littleton. Obviously it was not well suited to be a students' text-book—as Roger North said, the commentary was 'much more obscure than the bare text without it.'³⁵ The second Institute is a commentary on some thirty-nine statutes, and deals mainly with public law. The third Institute deals with criminal law, and the fourth Institute with the jurisdiction of Courts. Both the third and fourth Institutes are a good deal more elaborate than the books of Staunford, Lambard, and Crompton, which were the existing text-books on these subjects.

The first Institute was published in 1628. It was the only one of these four books published in Coke's lifetime. The others were not published till 1641. The reason is, I think, obvious. The first Institute dealt with topics very remote from the constitutional controversies of the day. The other three touched them at many points. In 1628, when the second and third Institutes were finished, Coke's active career was over. When the fourth Institute was finished Parliament had been dissolved, and the country was being governed by the Prerogative. We cannot blame Coke for not wishing to shorten his closing years by a close imprisonment in the Tower. He had recorded his views, their publication could wait till a more favourable season. When they were published in 1641 it was the hour of the triumph of the Parliament and the common law; and so the Institutes and the Reports were accepted without question as an accurate statement of the law. But in the last century Coke's writings have been attacked by two opposite schools of legal thought—by the historical school and by the analytical jurists.

Time has its revenges. Coke used to advise historians to be careful how they trespassed on to the domain of law³⁶; and now the historians have turned upon Coke and shown that his history is often inaccurate, and that he has misrepresented the medieval law. There is some truth in these criticisms. Coke's excursions into the domain of history were all made for the purpose of proving some thesis; and there is no doubt that history written from this point of view is, as history, worthless. But, before we condemn Coke, we must, in the first place, distinguish between his treatment of cases of a political or semi-political

³⁵ *Lives of the Norths*, i, 17.

³⁶ 3 *Co. Rep. Pref.* xiii.

kind, and his treatment of other cases; and, in the second place, remember that Coke's aim was to give an accurate presentation, not of medieval law, but of the law of his own day.

(i) There is no doubt that in cases of a political or semi-political kind Coke is sometimes inconsistent³⁷; and that sometimes, in his eagerness to prove his case, he badly misrepresents his authorities. Thus in his second and third Institutes³⁸ he states that one of the counts in an indictment of Wolsey contained an accusation that he had attempted to subvert the common law, and to substitute for it the civil and canon law. The fact is that the indictment in question was not an indictment of Wolsey, and the passage as to subverting the common law was merely the common form used in any indictment on the Statute of Praemunire. The errors into which he fell in his attack on the Court of Admiralty are well known, since they have been exposed by Prynne in the seventeenth century, and by Marsden in our own day. But in cases into which politics did not enter I do not think that a charge of inaccuracy is proved. His very able opponents, Bacon and Ellesmere, though encouraged by the king, found no serious errors in his reports except in these political or semi-political cases; and they knew the law of their own day more intimately than we know it. Bacon admitted that though his Reports 'may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over of cases'³⁹; and the writer of the Observations on his Reports made a similar admission. There are in them, he said, some things which are bad, some which are mediocre, but more things which are good.

(ii) Coke was not writing legal history: he was stating modern law. There is no doubt that in some of the cases, in which he states a proposition which is at variance with a medieval authority, he has the authority of a later case. Thus Pike has accused Coke of misrepresenting the text of Littleton⁴⁰; but in fact he had, as authority for his statement, a decision of Brian and Vavisor given after Littleton wrote.⁴¹ No doubt we cannot justify all his statements in this way; but, having regard to Bacon and Ellesmere's verdict, probably a good many can be so justified.

Let us now turn to the exceptions taken by the analytical^v

³⁷ Above, p. 333.

³⁸ Second Instit. 626; Third Instit. 208; Holdsworth, H. E. L. iv, 253, 257-8.

³⁹ Spedding, Letters and Life of Bacon, vi, 65.

⁴⁰ L. Q. R. v, 36.

⁴¹ Y. B. 5 Hy. VII, Pasch. pl. 5, p. 3.

jurists. Though Coke's use of history was often unhistorical, he was a lawyer of the historical school; and he had all the defects of the historical lawyer in an exaggerated form. He could explain all the anomalies which disfigured the law; and it seldom occurred to him that there was a distinction between explanation and justification. On the other hand, he has all the good points of the historical lawyer. The analytical lawyer looks solely or mainly at the ideas current in his own day, and is inclined to reject as useless all that is not in accord with those ideas. His views, being founded merely on his own ideas of contemporary convenience, are apt to be superficial. But the historical lawyer preserves the ideas of past ages; and those ideas, and the rules and institutions founded on them, sometimes come into their own again in a future age. Coke preserved the medieval idea of the supremacy of the law, at a time when political speculation was tending to assert the necessity of the supremacy of a sovereign person or body, which was above the law; and the obscurity and indefinite character of some of the medieval rules which he states, preserved for the common law the quality of flexibility.

Hobbes, one of Coke's younger contemporaries, was the greatest of all of our analytical jurists. In his *Dialogue of the Common Laws* he attacks Coke with those analytical weapons which Bentham and Austin have made familiar to modern lawyers. Law is simply the command of a sovereign. It is no product of artificial reason. It should be so clear that every intelligent layman can understand it. Hobbes's criticisms were approved by Stephen⁴²—though not altogether by Austin, who rightly said that Coke's mastery of the English legal system was equalled only by that of the great Roman jurists.⁴³ And just as the theories of Austin and Bentham were replied to by Maine, so were Hobbes's criticisms replied to by Hale, whose mastery of the history of English law led him rightly to distrust the simple reasoning of the analytical philosopher.

In fact, Hobbes saw part of the truth but not the whole. At the beginning of the seventeenth century many lawyers and statesmen agreed that some restatement of English law was needed. But what form should that restatement take? Bacon, the man best fitted to answer such a question, saw that the construction of a logical code was impossible. He suggested a much more conservative measure of reform—the compilation of a digest of case law and a digest of statute law, a book *de*

⁴² *Hist. Crim. Law*, ii, 206, n. 1.

⁴³ *Jurisprudence*, ii, 1130.

antiquitatibus iuris, a book of Institutes, a book *de regulis iuris*, and a book of terms of the law. But political events made the realization of Bacon's scheme impossible; and the outstanding merits of Coke's writings made the need for such a restatement less pressing. It is the outstanding merit of those writings which have here given Coke his great and lasting influence over the future development of English law. The extent and character of that influence I must now endeavour to summarize.

COKE'S INFLUENCE ON THE DEVELOPMENT OF ENGLISH LAW.

Coke's influence is apparent first upon the development of our private law; secondly, upon the form of our law; and thirdly, upon our criminal law and our constitutional law.

(1) The sixteenth century—the century of transition from medieval to modern—had seen many changes in all branches of private law. Therefore a great deal of restatement was needed to bring the medieval and the modern rules of that law into harmony. In fact, in any age in which fundamental changes have taken place, the law will need reconsideration and restatement; and it is not one of the least of the advantages of our system of case law that it can thus be adapted to a new environment. What a succession of eminent lawyers have done for the common law in the last century Coke accomplished for the common law of his own day. The manner in which he effected this work of restatement and adaptation can I think be summed up as follows:

First, he deduced from the scattered and often inconsistent *dicta* in the Year Books positive rules of law in harmony with the rules laid down by the modern reports; and he did his work so skilfully that later lawyers were content to accept his readings of the Year Books and the Abridgments of the Year Books. Secondly, in like manner, he brought the medieval literature of the common law into line with the modern literature. Glanvil, Bracton, Britton, and Fleta were made to explain and illustrate Perkins, Fitzherbert, Staunford, and Lambard. Thirdly, the information which his reports gave of the doings of the Courts outside the sphere of the common law, such as the Court of Chancery, the Star Chamber, and the Court of Admiralty, familiarized common lawyers with the new ideas originating in those Courts, which were giving rise to new legal developments. Therefore his reports made it easier for the common law to fill the great position which it acquired as the result of the constitutional conflicts of the seventeenth century. In these three ways Coke's writings ensured the continuity

of the development of the rules of English law amidst all the vast changes of this century of Renaissance, Reformation, and Reception of Roman law. This merit of Coke's writings was recognized in his own day by Bacon—'had it not been for Sir Edward Coke's reports,' he wrote,⁴⁴ 'the law by this time had almost been like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former times.' It was also recognized in this century by Maitland—'Coke's books,' he said in a letter to me, 'are the great dividing line, and we are hardly out of the Middle Age till he has dogmatized its results.' It is clear, therefore, that the great eighteenth century conveyancer, Charles Butler, who with Hargrave produced a classical edition of Coke upon Littleton, was right when he said that, 'the most proper point of view in which the merit and ability of Sir Edward Coke's writings can be placed, is by considering him the centre of modern and ancient law.'⁴⁵

(2) I turn to Coke's influence on the form of our law. The sixteenth century was a century in which many bodies of law, administered in separate Courts, and rivalling the common law, were springing up. At the end of that century the Chancery, the Admiralty, the Star Chamber, the Ecclesiastical Courts, were all putting forward claims to exercise a large jurisdiction. The only one of these Courts which succeeded in making good all its claims was the Court of Chancery. It succeeded in making good its claim to a jurisdiction independent of, and in some respects superior to, that of the common law Courts; and the effect of its success has been to split the English legal system into two halves. If all the other rival Courts had been equally successful the English legal system would have been split into many fragments. Coke saved English law from this fate. His success in asserting the supremacy of the common law, and his success in restating and adapting its principles to meet modern needs, made the English legal system a much more uniform system than it might otherwise have been; for it made the common law, as Holt once said, 'the overruling jurisdiction in this realm.'⁴⁶ But for Coke's efforts the common law might have become one among many equals. It would not have been the 'overruling jurisdiction in this realm'; and if this had happened both our criminal law and our constitutional law would have been very different.

⁴⁴ Spedding, *Letters and Life of Bacon*, vi, 65.

⁴⁵ *Reminiscences*, i, 118.

⁴⁶ *Shermoulin v. Sands* (1697) 1 *Ld. Raym.* at p. 272.

(3) Coke's influence upon both these bodies of law has been very large. The Star Chamber had added much to our criminal law—much that the common law Courts took over after its abolition. But it had borrowed something from the continental criminal procedure of the day; and one of the things which it had borrowed was the use of torture. Anyone who is familiar with the revolting character of that continental criminal procedure will, I think, agree that the elimination of torture from our criminal procedure, which was the consequence of the victory of the common law, by itself outweighs all the disadvantages that that victory may have entailed.⁴⁷ It made the English criminal procedure the model which was followed by France and other European countries after the French Revolution. Esmein tells us that in the seventeenth and eighteenth centuries the inquisitorial procedure—the procedure which involved the use of torture—prevailed; but that one European country—England—had escaped the contagion, and served as a model for the legislation of the French Revolution.⁴⁸

We have seen that one of the most decisive events in the history of our constitutional law was the fact that Coke, after his dismissal from the bench, became a leader of the Parliamentary opposition.⁴⁹ It was a decisive event because it cemented the old standing alliance between Parliament and the common law. In the Middle Ages and in the sixteenth century the lawyers had helped to make the English Parliament an efficient representative assembly.⁵⁰ In the seventeenth century Parliament handsomely repaid this debt by helping Coke to maintain the medieval conception of the supremacy of law, and to apply it to the government of a modern state. In this matter also England became a model both to the framers of the constitution of the United States and to the framers of constitutions in continental states. The Supreme Court of the United States is a body which safeguards, more effectually than any other tribunal in the world, Coke's ideal of the supremacy of the law. As to the debt owed by the framers of constitutions in continental states, Esmein is again a witness. After pointing out that the supremacy of the law was what Voltaire most admired in the government of the English state, he tells us that the framers of the French Constitution of 1791 made it its central principle.⁵¹

⁴⁷ Holdsworth, *H. E. L.* v, 170-76, 185-7.

⁴⁸ History of Continental Criminal Procedure (Continental Legal History Series) 322-3.

⁵⁰ Holdsworth, *H. E. L.* ii, 430-34, iv, 174, 188-9.

⁵¹ Essays in Legal History (1913) 214.

⁴⁹ Above, p. 335.

Both these achievements—the elimination of torture from criminal procedure, and the establishment of the rule of law—were due mainly to Coke's insistence on the supremacy of the common law; and their acceptance by later generations of lawyers, as fundamental principles of English law, was due to the manner in which he had stated and enforced them in his writings. Queen Elizabeth once boasted that she was 'mere English'. But her statecraft had large effects upon the course of European history. Coke was the most English of our great common lawyers. But seeing that these two achievements have made themselves felt whenever and wherever men have had the will and the power to establish constitutional government, we may claim that these large results of his work entitle him to a place amongst the great jurists of the world.

This is a large claim; but not I think too large. Intellectually Coke was a statesman of the Tudor period; and his work has all the characteristics of Tudor statesmanship. In fact it was its complement; for just as the Tudor statesmen succeeded in adapting the medieval institutions of the English state to modern needs, without any appreciable sacrifice of the medieval ideas contained in them, so Coke succeeded in remoulding the medieval common law in such a way that it was made fit to bear rule in the modern English state. As a lawyer and a statesman he belonged to the greatest period of the Tudor dynasty—the Elizabethan Age; and so, like many of the other great leaders of thought and action in that age, he was the author of much in our national life that we still rightly treasure. What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the authorized version of the Bible have been to religion, Coke has been to the public and private law of England. He was one of those great Elizabethans whose genius and enthusiasm enabled them, as Kipling has finely and truly said in his Elizabethan poem,

Lightly to build new world, or lightly loose

Words that shall shake and shape all after time.

THE INNER RELATIONSHIP BETWEEN ENGLISH AND ROMAN LAW.¹

FRITZ PRINGSHEIM.

IF a German professor announces his intention of speaking on the inner relationship between English and Roman law, he must first state why he intends to do so. When I reviewed Roman law, and later on English law, from the German point of view, it struck me again and again that the two systems touch each other at many points. It is obvious that this relationship must be clearer to a person acquainted with German law (and therefore speaking as an outsider) than it is to an English student who understands his law by working within the system and appreciates it accordingly. This, then, is one justification. Since I have not been brought up in English law, I shall always remain a layman, despite all my efforts to penetrate its nature.

It is the privilege of a traveller in a foreign country to take a swift survey of the ground, to compare the known with the unknown, to talk without responsibility of his impressions. In the same way, I ask permission to tell you freely what I believe I have noticed during my brief contact with English law, as regards its inner relationship with Roman law. For my second justification is that, even if I do not know enough about Roman law, my knowledge of it is such that I am comparing not the unknown with the unknown but what is superficially known with what is fairly well known.

Relationship between different systems of law may be based on very different grounds; these grounds may be either artificial or natural. The relation is artificial if it depends on adoption. By way of illustration I may point to the Reception of Roman law on the Continent, or, in more recent times, the adoption of German law by Japan and the adoption of Swiss, Italian and German law by Turkey. In such adoption, relationship may exist not only between the adopting and the adopted law, but also between several legal systems which are all affiliated to another single system.

¹ Address delivered to the Cambridge Faculty of Law, October, 1933. The Editor is much indebted to Mr. G. L. Williams of St. John's College, and Dr. David Daube of Caius College, for assistance in preparing this article for the press.

A natural relationship exists at an early stage between all primitive legal systems; each system during its youth seems to pass through a similar process before the peculiarities of the nation are impressed upon its juridical order. The like phenomenon may be observed at the opposite stage of development. In modern times, commerce and commercial arrangements have crossed the boundaries of nations, and, as differences of law are overcome, a relationship appears between the various systems which has even suggested the ideal of unity of law. I refer to the modern statute law concerning bills of exchange and cheques, and to modern copyright law. Of quite another kind, but not less natural, is that relationship of legal systems which follows the blood relationship of nations. Even where the history of nations has followed very different lines, and no direct influence can be traced upon the legal thought of one nation by that of another, a certain measure of relationship may yet be observed, because to a certain extent each nation has law which corresponds to its characteristics. Such a similarity could be shown to exist between German and Scandinavian law, over and above a common creation and the similar influences which have moulded them.

But even this is not the kind of relationship of which I speak. The ultimate Germanic source of English law is not here in question. There is still one more relationship; it has nothing to do with the blood relationship of nations but it arises from a spiritual and political attitude which is the fruit of history. In other words, this relationship is connected with the historic problems set a nation, and with the manner in which they have been solved. Such relationships must ultimately remain shrouded in mystery; one may, after earnest consideration, guess at them, but one can never explain them. Perhaps it is possible, with care, to discuss such a spiritual and psychical relationship between the ancient Grecian and the ancient German law. As between English and Roman law, it can be ascertained with as much certainty as is possible in problems of this sort. It is founded upon an undeniable similarity between these peoples, a similarity of national characteristics which they have exhibited during their long history. Its chief point can be put in a single sentence: the national attributes which enabled English and Romans to govern the world are the same as those which have formed their law. There is no doubt that the ability to form law is related to the ability to form a State. There is no doubt that political sense creates order in law as well as order in the world. He who wishes to rule must be able to form law; and

he who is able to carry out both these aims can make the whole world subject to his legal system, as the Romans did,—or half the world, as the English race does.

The science of comparative law may also proceed from such inner relationship, but the limits of this science must be kept in mind. It finds all its materials in the assumption of an unprovable hypothesis,—the hypothesis that a relationship really exists between the nations in question. One can easily go astray. Then there is another danger: English law has not remained free from the influence of Roman law. Since the twelfth century the Civil Law has penetrated England, and, in spite of the fact that it has been driven out, it has never entirely disappeared from English law.² Roman thought, which could ultimately be identified with Continental thought, was not excluded, however independent English law might be. Such relationship as is based on this fact must here be deliberately excluded. This is easily done with regard to English institutions, which without doubt are not the result of Roman influence. It is, however, more difficult where individual rules are concerned; here one would have to prove in each case that the rule is autochthonous, and there is not enough time for this. Nevertheless a series of single rules will be taken, which are almost certainly independent of Roman law. Often characteristic details tell more of the spirit of a system than the general basic lines.

Since our aim is to compare the genius of English and Roman law³ our comparison must involve legal history. I believe that the following proposition will be more readily accepted in this country than anywhere else: comparative law without the history of law is an impossible task. Each legal system can only be understood in its essential character if it is considered historically, and only from this point of view is comparison of law fruitful.⁴ One who compares law only as it is in force to-day—still more, one who limits his comparison to statute law or to particular doctrines—can never arrive at lasting and fruitful results. Minute investigation of every detail is indeed necessary, but it must be carried out on the basis of a comprehensive outlook; this is the real difficulty of genuine comparison.

² D. T. Oliver, *Roman Law in Modern Cases in English Courts* (Cambridge Legal Essays, 1926, pp. 243—257).

³ Sir Frederick Pollock, *The Genius of the Common Law* (Columbia Univ. Lectures, 1912); Roscoe Pound, *The Spirit of the Common Law* (1921); Ihering, *Geist des röm. Rechts*; Fr. Schulz, *Prinzipien des röm. Rechts* (1934).

⁴ Partsch, *Vom Beruf des röm. Rechts i. d. heutigen Universität* (1920) 21 ff.; Rabel, *Aufgabe und Notwend. d. Rechtswergl.* (1925) 8, 18.

Let us be modest at the present moment and content ourselves with a few sketches which will yet serve to show the way and the aim.

The attempt to compare English and Roman law is not new. In particular, Lord Bryce published some essays in his 'Studies in History and Jurisprudence,' which dealt with the 'methods of law-making in Rome and England' and with 'the history of legal development at Rome and in England.'⁵ But, during the period of more than thirty years since these studies appeared, our ideas upon Roman law, and especially upon classical Roman law, have been altered by many important works. It is principally this classical law that we mean, if we speak to-day of 'Roman law' in general. We have learned to separate clearly from this classical law the law of the *Corpus Iuris*, which was collected by the Byzantine emperor Justinian about three hundred years after the classical epoch. This later Roman law is still clearly traceable to the classical law, but it is no longer purely Roman; it has been altered by many later influences. It is evident that the characteristics of the Roman people are no longer clearly expressed in this compilation. Therefore our consideration must be directed towards classical Roman law. With this we break new ground. Continental law, with which is usually contrasted the English Common Law, is influenced by the law of Justinian, and the classical law has influenced it only indirectly. If Roman and English law were compared during the past, and by the former were understood the law of Justinian, it would be impossible to arrive at completely accurate results.⁶ The spirit of Roman law during its classical epoch is related to the spirit of English law; the spirit of Justinian's era is almost in opposition to the English spirit. This shows how much our comparison will gain if it makes use of later investigations and lays stress on the contrast between classical and Byzantine law. Now for the first time it can be clearly shown that two pairs are in opposition: on the one side the law of the *Corpus Iuris* and the Continental systems influenced by it, and on the other side the classical Roman law and the English law scarcely influenced by it, but bearing an inner relationship to it.

We may pass from these introductory remarks to actual comparison. It must again be emphasized that our point of

⁵ James Bryce, *Studies in History and Jurisprudence* (1901), Essays XIV and XV.

⁶ Similar observations are made by Professor H. F. Jolowicz: *Academical Elements in Roman Law*, 48 L. Q. R. (1932), pp. 171, 199.

view is purposely concerned with one side only; it lies beyond our province to describe the really important differences between English and Roman law. We shall be—indeed, we can only be—one-sided, because the other side is known to the expert and the student through their familiarity with English law.

My choice of material, which in no way exhausts the subject, is made from the German point of view. The similarities between English and Roman law which strike me are, of course, those in which both systems differ from German law. But as German law not infrequently corresponds with Continental law, this point of view is not too prejudiced. A special value must be placed upon the phenomena which belong to the classical epoch of Roman law, especially where alterations have occurred during the Byzantine period. If these alterations have later influenced the Continental systems, then our argument is complete. We shall first enumerate some points of general correspondence, then pass to a discussion of the scientific treatment of law and the administration of justice, and lastly we shall note some significant details.

Both English and Roman law have developed independently of foreign influence. This is a consequence of the strong national character of these nations; a proudly masterful attitude and adherence to tradition create peculiar and long-kept legal institutions. English law adopts suggestions from outside only very hesitatingly, and if, in a few cases, it resolves at last to adopt them, they are transformed in accordance with its own design into specifically English institutions. Although it is the same with Roman law, yet the influence of Greek thought from an early date cannot be denied. This, however, means not that the material content of Greek law was adopted (save to an inconsiderable extent), but that the schools of thought and the methods of Roman law were under Greek influence. The effect of this influence was that Roman law and its conceptions became scientifically elaborated. It would have become excessively theoretical and divorced from reality had it not been for the fact that (as in the case of English law) practical tendencies were always opposed to too much theory. In consequence, it is only in recent times that, by the increase of scientific study, the unsystematic and purely evolutionary character of English law is slowly being converted into the shape of a system.⁷ The Romanistic theory of law, which influenced and formed the

⁷ A. B. Schwarz, *Das englische Recht und seine Quellen* (Die Zivilgesetze der Gegenwart, Bd. II : England, 1, Teil, 1931), 75 ff.

Continental development, originated largely, as we know to-day, during the post-classical period. When Bryce remarks of Roman lawyers (with a side glance at the English) that 'they did not set out with abstractions, like our German and Scottish friends,'⁸ you must think exclusively of the classical and not of Byzantine jurists.

It is true that in English law, as well as in Roman law, we find Latin maxims, *regulae iuris*,⁹ couched in general terms. How far these maxims are traceable to Roman law, and how far they originated in England, does not matter. The point of importance is the fact that, although both English and Romans like to have maxims on the tip of their tongue, they do not trust them enough to submit without qualification to their effect. Fifty years ago Lord Esher said: 'I detest the attempt to fetter the law by maxims. They are almost invariably misleading.'¹⁰ In its early stages Roman law created a whole series of *regulae iuris*, which were useful while the groundwork of principle was being laid down. Yet these very *regulae* became a hindrance to the lawyers under the Empire, in the more detailed and freer creation of law. Paulus stresses the point: *Non ex regula ius sumatur, sed ex iure quod est regula fiat*.¹¹ The objection of the practical lawyer to narrowing theoretical rules could not be more concisely or severely put. As I have pointed out elsewhere, the predilection for the *regula iuris* belonged only to a later Roman period which turned from practice to theory.¹²

This adherence to tradition, which changes only in accordance with practical exigencies and even then very tardily, has enabled English and Roman law to keep their national characteristics, although both of them developed from the law of a small community into a world-wide system. Of course, neither was averse to adopting suggestions from outside, and in the course of centuries both have abandoned many an antiquated institution. But the saying of Maitland, the great historian of English law, applies to both: 'The common law, whatever else it may be, is pretty tough.' Sir Frederick Pollock, from whose 'Genius of the Common Law'¹³ I have taken this sen-

⁸ Bryce, *loc. cit.* II 202.

⁹ Broom, *Legal Maxims* (9th ed.), 1924.

¹⁰ 'They are for the most part so large and general in their language that they always include something which really is not intended to be included in them': per Lord Esher M.R. in *Yarmouth v. France* (1887) 19 Q. B. D. 647, at 653.

¹¹ Dig. 50, 17, 1.

¹² Beryt und Bologna (*Festschrift für Otto Lenel*, 1921), 244—251; F. Schulz, *Prinzipien*, 33 ff.

¹³ P. 93.

tence, after pointing out 'a certain masterful potency, not the less operative because not easy to define,' adds: 'Moralists may determine . . . whether any and what active virtues are of a higher order or have greater merit than toughness. At all events it is of the kind that prevails.' No Roman lawyer could have spoken in truer Roman spirit.

The Common Law is the law not of a class or of a kindred, but of the whole kingdom and the men who dwell therein. Roman law, also, differs from ancient German and other early systems in that it provides for all its citizens, while at the same time it builds up a special system for foreigners which is continually interchanging with the *ius civile*. Hence it follows that English as well as Roman law is reproached for being 'individualistic.' Such commonplaces as these are always dangerous in their superficiality. It is true that both systems give strong rights to the individual, that the British subject and the Roman citizen within their homes and families feel like little kings. Freedom is said to be the sister of the Common Law, but freedom to the English mind means the freedom of a citizen, whose whole soul and whose whole strength belongs to his country—just as the independence of the Roman citizen is, at least during the most glorious period, only the other side of his close, inborn and unconsidered connexion with the *res-publica*. It is true that for both nations law is the guarantor of the self-sufficiency of the individual.¹⁴ But this law is itself a national creation; in classical times supremacy of law exists because the law grows out of the will of the people. It was only the Byzantine Empire which coined the maxim that the emperor is a sovereign in whom all the law-making and all the coercive powers of organized political society are concentrated. With the Reception this principle became part of the law of Continental countries. Once more, Byzantine and Continental law are in opposition to Roman and English law.

Let us now turn to the scientific development of law and the administration of justice. Every one who has thought attentively about English and Roman jurists has been struck by their inner relationship. English as well as Roman lawyers are educated in and by the practice of law. In neither case is there any theoretical instruction, any real law school, any university with State examinations upon the result of which the judges of first instance are chosen. Recent investigation has shown how much we have overestimated the importance of legal instruction

¹⁴ On Roman freedom see now F. Schulz, *Prinzipien*, Chapter 'Freiheit' (95 ff.).

during the classical period.¹⁵ The first schools of law in the modern sense originated with the Byzantine age. They are the result of a long development which, keeping step with political and constitutional changes, gradually created a bureaucratic rank of judges. As famous members of the English bar rise to the bench, so in classical times the Roman praetors were selected from amongst the practical lawyers who had been tested in administration. In both countries the leaders in legal development are only a very small body, selected and approved by the nation on account of their long experience. The young Continental judge who, hidebound within a bureaucracy of thousands, pronounces his judgments far from the market-place, is unknown in both countries.

The ordinary Roman as well as the ordinary Englishman is interested in civil justice in a way that astonishes the Continental observer again and again. While we report only proceedings which are either criminal (and therefore stirring) or otherwise sensational, one can very frequently read in English newspapers reports of important civil cases. It is obvious that public opinion is engaged in forming law—as it was in Rome, where proceedings in the Forum caused general interest.

Only on the ground of such an aristocratic selection on the one side, and such a participation of the whole nation on the other side, can the great reputation enjoyed by the English judge as well as by the Roman jurist be explained. Nowhere on the Continent are the names of great judges so well known as in England; nowhere on the Continent does a form of action bear the name of its creator, as it might in Rome.

We speak of Roman lawyers, and must add a word of explanation for those who are not well acquainted with Roman procedure. It consisted of two parts. The parties meet before the praetor in order fix, with his assistance, the points of dispute in a written *formula*. This *formula* is at their disposal in the praetorian edict, an official programme which the praetor publishes at the beginning of his year of office. The programme contains a list of *formulae* of which the parties may make use during the year. The praetor who issues this series of *formulae* usually keeps very largely to the edicts of his predecessors, with whom he is linked by social and traditional ties. But he is in no way bound to this; he can drop a *formula* which

¹⁵ Pringsheim, *Höhe u. Ende der röm. Jurisprudenz* (Freib. Wiss. Ges. Fasc. 22, 1933; now reprinted in 'Capitolium,' *Romanorum iuris et historiae commentaria* (Istanbul, 1934) I, 2, 65 ff.); Pringsheim, *The Legal Policy and Reforms of Hadrian* (Roman Studies, 1934), 436.

has proved unsuitable, just as he can add new *formulae* when need arises. If no *formula* exists for a particular case, no action can be brought, unless the praetor chooses to issue a special *formula in factum* to meet the special circumstances. The second part of the procedure takes place before a lay judge, the *iudex*. Here the case is discussed on the basis of the *formula*, evidence is given and judgment pronounced.

It will be clear to every one who has worked scientifically that the formulation of the document before the praetor is of the greatest importance for the judgment. The whole result often depends upon the wording of the question. It is also obvious that the praetor who carefully ponders over his edict must himself form a preliminary opinion of future cases which may occur during his term of office. This brings a certain amount of theory into his considerations. He begins with actual practical cases which have occurred, but directs his glance towards possible future cases which may occur. That is one reason why the Romans have not remained mere practitioners, but have progressed into theory, into abstraction, into system. The praetor, however, does not stand alone when making and testing the *formulae*. At all periods of history he is surrounded by advisory jurists, for in any particular case a party can produce the opinion of an eminent lawyer, which influences the judgment to a degree varying with his repute. When Augustus grants the *ius respondendi* to some of the most renowned lawyers, these *responsa* acquire the special weight of a *responsum ex auctoritate principis*. The bestowal of this right gradually leads to a process of governmental selection, which is comparable with the elevation to the bench of prominent members of the bar. When the edict finally freezes into the *edictum perpetuum*, jurists continue their work of legal development by commenting upon this finished edict. Gradually the *responsa* are collected, and assume an authority which extends beyond the actual cases which called them forth¹⁶; they are cited also in later cases. Finally, this authority is conferred upon other writings of these lawyers, so that juridical works obtain in the end something of the force of law.

Every English lawyer has heard of the authoritative treatises on English law, of the works of Glanvil, Bracton, Littleton, Coke and Blackstone. They cannot be compared in number or in importance with those of Roman lawyers; they are less independent in the way they sum up the rules which

¹⁶ Pringsheim, *The Legal Policy and Reforms of Hadrian*, 435.

have been developed in practice. But their effect is just the same. Just as Gaius (whose talents lay above all in the direction of teaching and systematization) closed with his Institutes an epoch in Roman legal science, so Blackstone, the last of the English series, has not become an authority in the technical sense. But his Commentaries on the Laws of England ran to twenty-three editions, and Stephen's text-book, which even to-day occupies an important place, and which is in its nineteenth edition, is traceable to Blackstone not only in its title but also in its contents.¹⁷ In the same way, Gaius's introductory manual has become immortal in the Roman world by being incorporated into Justinian's Institutes. Neither Gaius nor Blackstone was a great practitioner; each belonged to that other class of lawyers who produced effect by their teaching. Nevertheless, in Rome as in England it is to the great practitioners that the Government turns if it needs experienced men for great political tasks. Both countries realize that judging and ruling are related activities.

If we look back to the picture which has been drawn of the part played by Roman legal science in procedure, the similarity to and the difference from the Common Law becomes clear. English case law, with its doctrine of judicial precedent, recognizes, as much as Roman law does, a traditional authority. But in England the authority is attributed to the decision of the judge, while in Rome it is attributed to the edict (which gradually becomes unalterable), to the *responsa*, and finally to all the ancient literature. Traditional authority in England is, therefore, at the same time less theoretical and more severe. In Rome the edict is more flexible, and the *responsum* is sometimes authoritative but not a judgment, and therefore less bound up with the facts of an isolated case. In this respect Rome is more scientific and less rigid.

In legal history there is a constant oscillation between elasticity and formalism. A judgment registers only the momentary equilibrium created by the balance of conflicting forces. In so far as the English Law Courts are never wanting in the knowledge of their own inherent powers and the courage to use them, their practice is certainly superior in point of elasticity to the method of application of Continental laws, but the formal authority of previous decisions frequently stands in the way of that adaptation to meet new needs and perceptions which was possible in Roman law at its best period. Both

¹⁷ [But it is only Blackstone's ghost which now haunts either the form or the substance of Stephen's work.—ED.]

systems, however, are in contrast to Justinianian and to most Continental conceptions, and we may better appreciate their merit if we take into consideration the epoch which is just passing away on the Continent, when the judge is only entitled to apply the law. Happily, all over the world the idea that administration of justice must at the same time involve the creation of justice is now in victorious advance.

A few suggestions only must suffice to show the relationship which exists between Common Law and Equity on the one side and *ius civile* and *ius honorarium* on the other.¹⁸ This relationship is so remarkable and so well known that we need only sketch it. The Common Law and *ius civile* are the old severe law which is relaxed by the jurisdiction of the Chancellor (or by the orders of the Roman praetor), and which is adapted to meet new necessities by taking account of *aequitas*. In both cases two systems are formed side by side; in both cases, a lasting interchange takes place between them. The relations between law and equity, between *ius civile* and *ius honorarium*, become harmonious and fruitful; each system enriches the other. Later, a fusion is effected in both England and Rome. While in England, in accordance with the Judicature Act, 1873, the rules of equity prevail, the emperor Constantine in the year A.D. 314 laid down the following rule: *placuit in omnibus rebus praecipuam esse aequitatis quam stricti iuris rationem*.¹⁹ But the emperor reserved to himself the right of interpretation between *ius* and *aequitas*.²⁰ The Judicature Act endeavoured to obtain and did obtain a fusion not of substantive rules but of jurisdictions; the administration of law and the administration of equity were melted together, but this did not involve a fusion of the two systems themselves. In the words of a great expert in equity: 'The two streams have met and now run in the same channel, but their waters do not mix.'²¹ Just as in Rome it was not the authority of Constantine but, long before him, the scientific work of many generations which had achieved a fusion,²² so in England, even after the Judicature Act, the process of assimilation by practice and legislation still continues.

Since the reform of procedure English law is free from the restraints of the old 'forms of action.' Writs, standard

¹⁸ Comp. W. W. Buckland, *Equity in Roman Law*, 1911.

¹⁹ C. Just. 3, 1, 8 (314).

²⁰ C. Just. 1, 14, 1 (316).

²¹ Snell, *Principles of Equity* (21st ed.), 9; A. B. Schwarz, *loc. cit.* 155.

²² Riccobono, *La Fusione del Ius Civile e del Ius Praetorium in unico ordinamento* (Arch. f. Rechts- u. Wirtschaftsphilosophie, 16 Zitelmann-Festschr.), 503 ff.

formulae for standard types of action, existed in England before the first advance of Roman law. To each writ corresponded a special kind of proceeding, an action. The action commenced at this early period with an application to the royal chancery to grant a writ, a *breve*. This writ set out the claim and the proceedings; hence by means of the writ the action became individualized. With the assistance of lawyers a number of such writs was gradually formed; upon these writs turned all legal life and legal learning. In consequence, English law began with a system of actions; not the substantive rules, but the form of action, decided the structure of law.

If we recall what has been said concerning the edict and Roman procedure, the analogy is surprising. It remains surprising even though we take into consideration the fact that the function of the writ is not the same as that of the *formula*. For the writ starts the proceedings, whereas the agreement of the parties to the *formula* occurs only during the first part of the proceeding itself. The analogy becomes more striking if we reflect that for new combinations of fact new writs are issued, the so-called writs 'upon the case,' the *formulae in factum* of the Roman procedure. The English system of 'forms of action' was retained until the middle of the nineteenth century. Its effect extends up to the present time, for the rules which were developed in connexion with these actions are still valid to-day. It is only possible to understand English law by reference to the old writs. Almost the same can be said of the Roman system of actions, which is still distinctly perceptible in the law of Justinian.²³

In all this there appears not only a tough tradition, but also the naïve attitude of not wanting to depart from the single type which has been evolved through the centuries. Only in dispute does law become distinct, and the care which is taken in building the individual *actio* makes it almost a living entity. In England, as well as in Rome, a taste for the particular, for the characteristic, for reality and reasonableness apart from all abstract ideas, is the basis of this kind of art, of this love of the concrete, a love of the individual, personified action.

No wonder that, in entering the domain of art, both nations show a similar inclination and endowments. Eminently Roman and eminently English is the ability to portray, and especially the ability to depict the characteristic head; both Roman

²³ Wlassak, *Anklage u. Streitbefest.* (Abhandl. Wien. Ak. 184, 1917), 146 ff.; Riccobono, *SZ* 47 (1927), 101 ff.; Steinwenter, *SZ* 54 (1934), 376; Collinet, *Procédure par libelle* (1932), 429, 456 (with different treatment).

sculptor and English painter exhibit a grasp of personal characteristics, a sense of reality and of the significant, which is related to the juridical talent just described.

To descend to details, may I call your attention to the action of *assumpsit*, which played such a large part in practice. If a promise is made by simple contract, no action can (in general) be brought to enforce it specifically; the only action is one for damages for breach of contract. Similarly, Roman law recognizes only an action for compensation; every judgment is a judgment for a sum of money. Both the English²⁴ and the Roman doctrines are at the present day explained by reference to the original criminal character of the action for debt.²⁵ Within the province of the law of tort an award of exemplary damages (*i.e.* for double or thrice the value) is possible in both countries.

The Common Law Courts allowed no action for specific performance; this was introduced only by equity. The Roman praetor tried to remove the dangerous consequences of the doctrine of *condemnatio pecuniaria* by attempting to induce the defendant to fulfil the plaintiff's demands.²⁶ In the English law of tort the compensation which the defendant pays transfers the property of the plaintiff to him: *solutio pretii emptionis loco habetur*.²⁷ The same doctrine obtains in the Roman proceedings regarding property.²⁸

The short time which still remains to me will be employed in enumerating a series of details; but if we wish to deduce from them an inner relationship of the two systems, it is necessary to arrange such details in larger divisions. For relationship can only be based upon the genius of law.

Temperate men are cautious in resorting to legal proceedings where a person has made a gratuitous promise, unless something has been done in fulfilment of the contract. Perhaps we can in this way explain the difficult English doctrine of consideration²⁹ and the Roman Law forbidding gifts which exceed a certain amount, as well as the Roman rule that declares

²⁴ Anson, *Law of Contract* (17th ed. 1929), 54.

²⁵ *Neuere Ansichten und Literatur bei Betti, Le fonti dell' obbligazione romana* (Arch. giur. (1925), 309 ff.) and G. I. Luzzatto, *Origini e natura delle obbligazioni Romane* (1934), 8 *et seq.*, 102 *et seq.*, 233 *et seq.*

²⁶ Levy, *SZ* 42 (1921), 478 ff.

²⁷ *Cooper v. Shepherd* (1846) 3 C. B. 266, 272; cf. *Brinsmead v. Harrison* (1871) L. R. 7 C. P. 547.

²⁸ Ehrhardt, *Litis aestimatio* (1934), 106 *et seq.*; Carelli, *L'acquisto della proprietà per 'Litis aestimatio' nel processo civile Romano* (1934).

²⁹ Rheinstein, *Die Struktur des vertragl. Schuldverh. im anglo-amerikan. Recht* (Beitr. z. ausl. u. intern. PrivR., Heft 5 (1932), 55 *et seq.*, 80 *et seq.*, 119 *et seq.*).

invalid promises of gifts between husband and wife.³⁰ In both systems a gift once completed is incontestably valid.

Both the English trust and the Roman *fides* (*fiducia*, *fidei-commisum*) are expressions of a standard which is accepted by all honest and reasonable persons who submit to the rules of fair play. Good faith, *bona fides* in all kinds of business, is capable of being made the test of lawful conduct where it is in harmony with the duties of an honest citizen. If this *bona fides* is specially the criterion of the honest merchant, be he a Roman citizen or a foreigner (and in Roman law the *bonae fidei iudicia* are common to *ius civile* and *ius gentium*), there is neither room nor need for a special commercial code, nor for a special commercial Court.³¹ In the same way, the English law merchant has grown from international custom; but since the seventeenth century, and especially through the intervention of Lord Mansfield, it has been adopted in its entirety by the Common Law.³² In consequence, neither England nor Rome has a distinct commercial law applicable only to merchants, nor a special commercial Court.³³

The spirit of a legal system becomes specially evident in connexion with its treatment of property, its protection of creditors, and its law of succession.

It is not necessary to prove that both Romans and Englishmen desire a strong property law, which allows the individual to be free and (as far as possible) uncontrolled. Whereas, according to the Grecian and most other legal systems of the world, the finder of a thing can claim a reward,³⁴ this reward is denied by Roman and English law.³⁵ The finder has to return the object to the proprietor without any reward. Whereas in all other systems special rules are provided concerning the loss of property, and in many of them the finder acquires ownership where the owner does not claim the article within a certain time, neither Roman nor English law knows any such rules.

In English law the position of the tenant at will or on sufferance, and in Roman law that of the *precario possidens*, is

³⁰ Jörs, RPR. 170 n. 3; Bruck, Die Gesinnung des Schenkers bei Joh. Chrysostomus (Mnemosyne Pappoulas, 1934), 79.

³¹ L. Goldschmidt, Universalgeschichte des Handelsrechts I, 1 (ed. 3, 1891), 58 *et seq.*

³² Holdsworth, Sources and Literature of English Law (1925), 208 *et seq.*

³³ The 'Commercial Court' is only a part of the High Court of Justice.

³⁴ Gieseke, Fund u. Schatzfund (Rechtsvergleich. HandWörtBuch. 3 (1931), 548 *et seq.*

³⁵ Roman law: Dig. 47, 2, 43, 9. English law: Halsbury, Laws of England (2nd ed.) I, 730—733; VIII, 500; Stephen's Comm. (19th ed.) II, 209, 228.

weak against the owner, but strong against all third persons. Both possess a thing through the toleration of the owner but without having a *ius in rem* or a *ius in personam*. A leading authority upon English Real Property law makes, in connexion with the tenant on sufferance, a statement which unconsciously shows the relationship with Roman law.³⁶ 'A tenant at sufferance,' he says, 'is in a precarious position. He may be ejected at any moment. . . . On the other hand, a tenant at sufferance is in possession, and therefore he can maintain trespass against a third party.' Exactly the same rule is found in Roman law.³⁷

As regards the transfer of land, there is in Rome as well as in England an aversion to State control. The publicity which used to attend the ancient *mancipatio* grew less and less, and the register which the Romans found (and even reformed) in Ptolemaic Egypt³⁸ was never incorporated into the law of the Empire as a whole. The 'reception' of the late Roman method of transferring estates, with its lack of publicity, was, therefore, an unfortunate event for the Continental countries concerned. It has been remedied in modern Germany only by recourse to the rules of ancient German law. The land register, the German 'Grundbuch,' is an institution of which Germany is proud.

In England attempts to provide a system of registration of title were thwarted, and ever since the seventeenth century the country has suffered from this defect, which finds its expression in a difficult system of conveyancing.³⁹ It is only in recent times that, after many attempts and experiments, the public transfer of land seems to be making headway.⁴⁰

It is a significant characteristic of both English and Romans that they protect the creditor and hold the debtor to his word. It was not until the Byzantine epoch that, out of mistaken Christianity, pity was taken on the debtor, who was regarded as the weaker party. On the Continent this tendency has a long history stretching to the present day.

I do not wish to put stress upon the analogy between the development of the English and the Roman law of pledge. True, both cases show how long it takes for the over-strong security of a creditor to be weakened; but of this development there are similar instances in other systems. More important is the fact that classical Roman law⁴¹ and English law⁴² (in contrast with

³⁶ G. C. Cheshire, Real Property (3rd ed.), 158.

³⁷ Dig. 43, 26, 4, 1.

³⁸ Von Woess, Urkundenwesen (Münch. Beitr. 6, 1924), 98 ff.

³⁹ Elphinstone, Introduction to Conveyancing.

⁴⁰ Law of Property Act, 1925; Land Registration Act, 1925.

⁴¹ Siber, RömPrivR. (1928), 297.

⁴² Halsbury, Laws of England (1st ed.) XV, 884 (s), 922 (c) ('Guarantee').

the late Roman ⁴³ and all modern systems ⁴⁴) strengthens the security of the creditor by making the guarantor liable along with the principal debtor. Neither system recognizes the *beneficium excussionis*, an order to the creditor to obtain judgment against the principal debtor, and to levy execution, before he proceeds against the guarantor.

The Digest enunciates the principle: *impossibilium nulla obligatio est*.⁴⁵ Later investigations have proved that this sentence was torn from its context by Justinian's compilers and erected into a general rule. Classical law was not inclined so easily to free the debtor and leave the creditor to bear the whole risk. A German writer upon this subject has called the doctrine based upon the principle just cited 'pseudo-Romanistic.'⁴⁶

English law regarded any one who had given a promise as being an insurer.⁴⁷ Originally, impossibility of performance was no defence unless liability was excluded in advance by the contract.⁴⁸ Quite in the spirit of Roman classical jurists, a contract was at last regarded as invalid only if performance was physically impossible, or if the promisor made the performance of his promise conditional upon its continued possibility.⁴⁹ A few mitigations do not change the picture considerably, even if a mitigating tendency is visible. This tendency is largely derived from the judgment of Blackburn J., in the leading case of *Taylor v. Caldwell* (1863)⁵⁰; but Blackburn himself supported the Romanizing tendency,⁵¹ and hence he referred to Pothier, who summed up the Roman French theory, and to the Roman principle: *impossibilium nulla obligatio*. The learned judge himself seemed to feel that these arguments were most un-English, for he continued: 'Although the civil law is not of itself an authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded.'⁵² I hardly think that present-day English lawyers would agree with this.

⁴³ Nov. Just. 4.

⁴⁴ A. B. Schwarz, *Garantievertrag und Bürgschaft* (Rechtsvergl. HandWörtB. 3 (1931)), 608 *et seq.*

⁴⁵ Dig. 50, 17, 185.
⁴⁶ Rabel, *Origine de la règle: impossibilium nulla obligatio* (Mélanges Gérardin (1907)); Rabel, *Unmöglichkeit der Leistung* (Aus röm. u. bürgerl. Recht, Festg. f. E. I. Becker), 193.

⁴⁷ *Paradine v. Jane* (1647), Aleyn 26: 'But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good.'

⁴⁸ Anson's *Law of Contract* (17th ed.), 368 *et seq.*; Rheinstein, *D. Struktur des vertragl. Schuldverh.* 160 *et seq.*

⁴⁹ Roman law: Rabel, *loc. cit.* Mel. Gérardin 479, Festg. Becker 194. English law: Anson's *Law of Contract*, 368; Rheinstein, *loc. cit.* 161 *et seq.*

⁵⁰ 3 B. & S. 826.

⁵¹ Rheinstein, *loc. cit.* 173.

⁵² *Taylor v. Caldwell*, 3 B. & S. at p. 835; Rheinstein, *loc. cit.* 175.

If the creditor is to be protected, the debtor must be prevented from putting forward counterclaims which, though they may be unfounded, will nevertheless delay the creditor's action. Therefore, neither England nor Rome at first admitted any *compensatio*,⁵³ later they allowed it in the case of bankruptcy,⁵⁴ the case which caused most hardship, and finally the doctrine was very hesitatingly extended. Late Roman⁵⁵ and Continental law are more favourably inclined towards *compensatio*.

The creditor must be able to rely on the word of his debtor. If the debtor is allowed to escape from an agreement too easily, on the plea of mistake, confidence in subsisting agreements will be shaken. In German law, error which affects the essential character of a person or thing⁵⁶ enables the person under the mistake to rescind the agreement. The same great German authority who has proved that this error relating to essential character (*error in substantia*) originates not from the classical Roman lawyers but from their feebler Byzantine successors,⁵⁷ points out that English practice, differing from all Continental systems, is very nearly related to that of the classical period. According to English as well as Roman law, *error in substantia* can only be considered if it is common to both parties, and if the object is of quite a different kind from what the parties assumed. This authority says: 'A person who knows the English practice with regard to contracts must admit that a very fine appreciation is usually shown of the requirements of life—and it seems to me that this fine appreciation is not denied even here.'⁵⁸

The spirit of a legal system which regards the owner of property as unfettered in his control over it will also reveal itself in the law of succession. Both Roman and English law give unlimited efficacy to dispositions *mortis causa*. The Englishman, like the Roman, likes to manage his fortune with firm hand. In both countries the testament stands at the head of the law of succession.⁵⁹ Legal succession by inheritance, which in

⁵³ English law : E. Heymann, Ueberblick ü. d. engl. Privatrecht (Holtzendorff-Köhler, Encyclop. 2 (1914) 333; Odgers, Common Law (3rd ed.) II, 563. Roman law : Siber, RömPrivR. 275.

⁵⁴ English law : see last note. Roman law : *actio cum deductione* of the *bonorum emptor*.

⁵⁵ Biondi, *Compensazione* (1927), 48 *et seq.*
⁵⁶ BGB s. 119 Abs. II : Als Irrtum über den Inhalt der Erklärung gilt auch der Irrtum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen werden.

⁵⁷ Otto Lenel, Der Irrtum über wesentliche Eigenschaften, *Iherings Jahrbücher* 44, 1; *Revista de derecho privado*, (1924) 123, (1925) 161; Beseler, *Error in materia*, *Byzant.-Neugriech. Jahrb.* 1 (1920), 343.

⁵⁸ Lenel, *Arch. Ziv. Prax.* 123 (1925), 172.

⁵⁹ Roman law : Siber, Röm. Priv. R. 334. English law : Pringsheim, *Succession* (Die Zivilgesetze der Gegenwart, Bd II; England, 1, Teil), 646.

most Continental codes takes precedence over the law of testacy both in place and in importance, occupies in English and classical law a secondary position. A person who allows the law to determine the succession to his property is negatively called 'one who has made no last will,' an intestate, an *intestatus*. Both the Englishman and the Roman have an intense and holy horror of intestacy.⁶⁰

The will of the testator is so highly esteemed that neither classical Roman⁶¹ nor English⁶² law recognizes any legal compulsion to provide for wife and children; again, they are very much in opposition to Byzantine⁶³ and to modern Continental⁶⁴ law. Most astonishing of all, however, is the similarity of methods adopted to avoid the dangerous consequences of the rule. In Rome, if the testator passed over near relations in his testament without good reason, this could be regarded in certain circumstances as a *color insaniae*, a sign of mental deficiency, and the testament could be annulled—a somewhat rude and severe method.⁶⁵ According to English practice, partial insanity, monomania, is sufficient to annul a will.⁶⁶ In one case, a daughter alleged the partial insanity of her father; the deceased had an insane aversion to his daughter and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be given by the contested will. The Court held that she must prove that the deceased was insane with regard to her, notwithstanding his general sanity.⁶⁷ In consequence, a delusion which affects the dispositions nullifies the will.⁶⁸

To the Roman way of thinking, the right to the *dos* is sufficient for the protection of the wife; provision for children can be left to the care of the testator. According to the English view, a marriage settlement in favour of the wife and children gives sufficient protection. There is, however, a movement in favour of some change in the law.⁶⁹

Here I must finish. I trust I have succeeded in showing that there exists an inner relationship between English and

⁶⁰ Roman law: Von Woess, *Das röm. Erbrecht* (1910), 31 *et seq.* English law: Pollock and Maitland, *Hist. of Eng. Law* (2nd ed.) II, 356 *et seq.*

⁶¹ Siber, *loc. cit.* 374.

⁶² Pringsheim, *loc. cit.* 646.

⁶³ C. Just. 3, 28, 30; Nov. Just. 18 and 115.

⁶⁴ Colin-Capitant, *Cours élément. de Droit Civil Français* (3rd ed.) 3 (1922), 708.

⁶⁵ La Pira, *Successione ereditaria* (1931), 509 *et seq.*

⁶⁶ Williams on Executors (12th ed.) i, 21.

⁶⁷ *Dew v. Clark* (1822) 1 Add. 279, 284; 3 Add. 79.

⁶⁸ Williams, *ibid.*

⁶⁹ Pringsheim, *loc. cit.* 646 n. 2a.

Roman law, and that this relationship becomes more striking if our attention is directed not, as formerly, to the *Corpus Iuris*, but to classical Roman law. I shall be happy if the conviction has gained strength in your minds that it is necessary to study classical Roman law even in England. My chief aim will have been attained if your attention has been drawn to this relationship, which helps to elucidate the spirit at once of English and of Roman law. This spirit, the fundamental character of a nation, will always remain a secret; it is not at all desirable to attack it with rational considerations. But my lecture is not at fault if, at the end, it confesses that we stand face to face with an insoluble riddle, with a mystery.

PRECEDENTS IN CONTINENTAL LAW.

ERNST J. COHN.

THE recent discussion of precedents in English law is of great interest to Continental lawyers, because Continental law also has some slight experience of the doctrine of binding force of judicial decisions.

In German law, as a rule, judicial decisions of course have no binding power at all as precedents. But there exists one rather strange exception as to its highest Court, the Reichsgericht: for whilst other Courts are free to follow or to disregard either their own decisions or those of other superior or inferior Courts, this Court is bound to a certain extent by its own decisions.¹

Para. 136, sub-paras. I to III of the German Statute concerning the constitution of the Courts is as follows:—

‘If in a legal question a Senate² of civil law wishes to depart from the judgment of another Senate of civil law or of the united Senates of civil law or a Senate of criminal law or the united Senates of criminal law, then in the former case a judgment of the united Senates of Civil Law, in the latter case that of the united Senates of Criminal Law, must be obtained.

A judgment of the legal question by the “Plenum” is necessary if a Senate of Civil Law wishes to depart from the judgment of a Senate of Criminal Law or of the united Senates of Criminal Law, or a Senate of Criminal Law from the judgment of a Senate of Civil Law or of the united Senates of Civil Law, or a Senate from the decision of the “Plenum”.

The decision of the legal question by the united Senates or the “Plenum” is binding for the case to be decided. This decision is given without previous verbal pleading.’³

The object of this section is not to bring about an unchanging fixed tradition in legal doctrine, but simply to unite the present judicial doctrine without making a change in the future impossible in any way. Therefore no senate is bound by its own

¹ The same provision is to be found in Art. 49 of the Japanese Statute relating to the constitution of the Courts of Judicature of 1890.

² ‘Senate’ means a division of the Supreme Court which consists of five judges. The whole bench of the Supreme Court never tries cases. They only sit by ‘senates.’

³ I.e. verbal pleadings before the ‘Plenum.’

decisions, but only by decisions delivered by any one of the other senates.

The word 'Plenum' defines a body which according to para. 137 of the same statute comprises at least two-thirds of all members of the Reichsgericht, *i.e.* about fifty persons. That so large an assembly—however eminent its members may be—is not the best possible body for deciding questions of the utmost difficulty and complication seems to be unquestionable. It is still more curious that according to the statute it is much easier for a Senate of Civil Law to disregard a decision of another Senate of Civil Law than to reject a decision of the Senate of Criminal Law, even if the point in question is a matter of civil law which happens to be of importance in a criminal case. The authority given to Senates of Criminal Law with regard to those of Civil Law and *vice versa* is stronger than that given to a senate of the same legal branch, whatever the subject-matter in question may be.

It is clear that while the practical field of application of the binding force of precedents is incomparably smaller than in English law, its intensity is—at least theoretically—in one direction a stronger one. It is not the decision of a certain case with fixed circumstances which is binding. The wording of the statute shows clearly that it is the meaning as to a question of law expressed by a senate in a former case, to which ruling force has been given. I need not say that a recurrence of the same legal question is much commoner than the recurrence of the same or even similar circumstantial facts. Continental lawyers are so much accustomed, when appreciating the value of any legal opinion, to find it, not in the decision of a real case, but in the theoretical answer of a more or less abstract question that this difference between German and English law must not be taken as a merely accidental result of positive legislation, but as a consequent and significant outcome of a difference in the respective legal systems prevailing in England and in Continental law.

But apart from this difference there is nothing in the Statute which could make it unfit for a comparison with the English doctrine of 'stare decisis,' and the experience acquired by German lawyers within the past fifty-five years (since the enactment of the Statute) may be of some value even to English lawyers. There is scarcely a German lawyer, whether practitioner or theoretical observer,⁴ who will deny that the experience

⁴ Cf. Prof. Riezler's remarks in his recent article on 'Ratio decidendi und obiter dictum im Urteil,' *Archiv für die zivilist. Praxis*, vol. 139 (1934), p. 195.

has been a bad one and that the Statute has proved to be somewhat futile. The judges themselves in the Supreme Court have not concealed their dislike of the Statute, and in fact they have tried with great success to diminish its effectiveness as far as possible. The strangest interpretations have been applied for the purpose of avoiding the necessity of asking the united Civil or Criminal Senates, or even the 'Plenum,' for a decision. Scientific literature has not failed to give to this tendency, which is sometimes too obvious, the nickname of 'horror pleni'.⁵

In most cases the avoidance of a plenary decision can be achieved by adopting the meaning that the legal question in the new case is not entirely the same which arose in the former one. The highly developed art of accurate distinction so well known in English law has found here a modest parallel, which perhaps is not quite so praiseworthy as the English form because the principles of interpretation acknowledged on the Continent, especially in recent years, are rather strongly opposed to it.

Even eminent lawyers who in their early years have learned that '*bene iudicat, qui bene distinguit*' do not always manage to find means of distinction. Yet in such cases as these the Reichsgericht has found a method of avoiding what is to them a very troublesome ceremony. Thus German practice has found some principles of interpreting the paragraph in question, the most important of which it may be of some interest to note.

(a) The Reichsgericht does not feel itself bound by any legal determination expressed in a former decision, which was not material for the final decision itself.⁶ Every English lawyer who reads that sentence will immediately feel himself reminded of the English doctrine of *obiter dicta*. Indeed, some recent judgments expressly use the phrase '*beiläufige Bemerkungen*,' which is the most literal translation of *obiter dicta* that is possible. In none of these decisions can a reference to the English doctrine be found, and it seems certain that the German doctrine has grown up wholly independent of the English maxim. This then is a strong proof of the great similarity of 'legal minds'⁷ as well as of the very great influence which practical needs necessarily have upon legal life.

(b) The Senate is not bound by another Senate's decision if

⁵ See the somewhat exaggerated article of *Ernst Fuchs*, 'The horror pleni' in *Leipziger Zeitschrift für deutsches Recht*, 1927, p. 8355, and *Roesener*, *Reichsgericht und horror pleni* (Leipzig, 1912).

⁶ Official edition of decisions of the Reichsgericht in cases of civil law (abbr: RGZ), vol. 134, p. 122; vol. 105, p. 90; vol. 76, p. 145; and very many other decisions.

⁷ See Sir Maurice Amos' excellent article on the 'Legal Mind' in 49 L. Q. R. 27.

the latter answering informally to a question put to it by the former Senate declares that it does not intend to follow its former opinion in the future.⁸ There is not the slightest argument to be drawn from the wording of the Statute to the effect that this exception was contemplated by the Legislature. The doctrine therefore is a clear illustration of the freedom of discretion in interpretation conceded to Continental Courts by Continental legal theory. But it must be admitted that the decisions in question have been disapproved by several writers as contrary to the written law.⁹

(c) Still stronger objections could be raised against a decision in which one Senate has decided that it does not feel itself bound by the decision of another Senate, if in the meantime the principles of interpretation have undergone a considerable change. Such changes in Continental countries happen within a comparatively short time, and a decision of the year 1902 was therefore not followed in 1921, because, as the Court in the latter decision pointed out, the Courts during this period have more and more endeavoured to avoid formalism and to interpret statutes—even if they refer to the law of procedure—according to their purpose and reason rather than according to their wording.¹⁰

(d) The strangest exception perhaps is that concerning the decisions of the sixth Senate of Civil Law. During the time of monetary inflation it became inexpedient to have more than five Senates of Civil Law in the Reichsgericht. Therefore the sixth Senate was dissolved and its members became members of the other civil and criminal Senates. These Senates declared that the binding force of the decisions of the sixth Senate ceased with its dissolution. Later, an enlargement of the number of the Senates again became necessary and a new sixth and even a seventh Senate of Civil Law have been constituted. But the new sixth Senate has not been regarded as identical with the old one and a revival of the binding force of the latter's decisions has not taken place, while the decisions of the present sixth Senate have binding force. This is of far-reaching importance owing to the fact that the former sixth Senate did not agree on many questions with the other Senates as it adhered to more conservative principles of interpretation. Its dissolution therefore has freed the other Senates from precedents which under normal conditions probably would have made it necessary in more than one case to appeal to the united Civil Senates or to the 'Plenum'.

⁸ RGZ 139, p. 36; 132, p. 223; 115, p. 26, and in many other decisions.

⁹ Baumbach, GVG and ZPO, commentary, 6th ed. GVG par. 136, n. 2.

¹⁰ RGZ 102, p. 278. See Baumbach, GVG par. 136, n. 2.

On the whole, the effect of para. 136 is—as already mentioned—not at all satisfactory. There exists considerable doubt whether such a provision is necessary to uphold uniformity in legal practice: in France no decision of the Cour de cassation has binding force as a precedent, not even a decision of ‘toutes chambres réunies’. ‘La Cour de cassation n’est pas liée elle-même par sa propre jurisprudence. Le lendemain, dans une affaire semblable, elle pourrait adopter une autre manière de voir.’¹¹ So strongly is French opinion opposed to the theory of the binding force of judicial decisions that even the decision of the Cour de cassation which has quashed the decision of an inferior Court does not bind the ultimate inferior Court which finally decides the case which has been submitted to it by the ‘renvoi’. If—in a very exceptional case—the inferior Court departs from the view taken by the Cour de cassation, a decision of the ‘chambres réunies’ of the Cour de cassation has to be delivered and only this decision must be followed by the inferior Court to which the case is returned for final adjudication.¹² In this, French law probably goes too far in its opposition to precedents. But notwithstanding the lack of a provision comparable to para. 136 it cannot be said that the decisions of the Cour de cassation show differences of opinion which have been avoided by the German law.

Two conclusions may be drawn from the history of the application of para. 136.

(I) The flexibility of statute-made law is greater than that of judge-made law. That is proved by the fact that the Reichsgericht in many cases has found it easier to interpret the statute in such a way as to render it possible to avoid a plenary decision than to reach the same result by interpretation of precedents.

(II) English law is much more conservative than Continental law. It may not be of decisive importance that on the Continent decisions of more than fifty years ago are very seldom quoted and still more seldom followed in later decisions. But surely it is significant that Continental lawyers are of opinion that a statute, which expressly orders judicial decisions to be binding, cannot mean that such binding force should be given to decisions so far back as twenty years ago.

¹¹ Colin et Capitant, *Cours de droit civil* (6th ed. 1930) I, p. 41.

¹² Loi relative à l'autorité des arrêts rendus par la Cour de cassation après 2 pourvois (April 1, 1837), cf. Riezler, *loc. cit.* p. 198.

LAND COMPANIES.

By the late W. J. WHITTAKER.¹

[William Joseph Whittaker, after graduating as 'Senior' in the Law Tripos and Chancellor's Medallist, in 1888, and winning a Whewell Scholarship in 1890, was a very successful teacher in the Cambridge Law School till 1900, when he went into practice. In 1901 he was appointed Professor of English Law at University College, London, and, in 1905, to a post on the staff of the Council of Legal Education. In that year he married Hildegarde, daughter of Walter Wren, who survives him. He died in 1931.

He held no Fellowship, but was admitted to membership of the Trinity College Combination Room. It was soon discovered, first by Henry Jackson, what manner of man he was. He was an admirable talker and good talk was, no doubt it still is, appreciated there. For argumentative purposes he liked to be in a minority: on one occasion he set out to convince a dazed assembly of classical dons that Aristotle was the most overrated man of antiquity.

He wrote little, but his translation of *The Mirror of Justices* for the Selden Society and the eighth edition of *White & Tudor* testify to his powers and their range. Of the esteem in which he was held at Lincoln's Inn the words of Mr. Wilfrid Greene, K.C., inscribed on his tombstone are sufficient evidence: 'He was greatly beloved by all of us who knew him, a great scholar, the soul of kindness and one who despised everything that was mean or little. His combination of great qualities gave him a unique place among us and he will always be held in affectionate remembrance.'

Maitland knew the quality of his mind, but it was the quality of his heart which led to the close friendship between them. For Whittaker was naturally loyal and affectionate. Though he occasionally made a parade of cynicism (in which nobody believed) he had a very sympathetic heart. He was an excellent lawyer. He was a better friend.—W. W. B.]

¹ The task of editing and condensing Mr. Whittaker's material has been carried out by Mr. H. E. Salt of the Chancery Bar and sometime Fellow of Trinity College. He has made as few alterations and additions as possible, and (as he hopes) has omitted none of the author's characteristic touches.

I.

INTRODUCTORY.

RECENT years have witnessed a great decline in the practice of settling land, especially *inter vivos*. Where settlements of any considerable quantity of land have been made since the Great War, the machinery of the trust for sale has generally been preferred to that of the strict settlement, but neither method affords the means of substantially mitigating the incidents of taxation which for a variety of reasons fall with special weight upon landowners. Incorporation under the Companies Acts has been resorted to by proprietors of large and moderate-sized estates in an effort to find some relief from the burden of liability (a) to super-tax and its successor surtax, (b) to estate duty. It is with the latter aspect that this article is concerned.² The estate or land company incorporated primarily for this purpose (as opposed to the estate or land company incorporated primarily for speculating in sites and developing them by building or otherwise) is substantially a device invented by conveyancers in the interests and upon the instructions of landed proprietors. It may be said to be still in an early and experimental stage of its career. The Treasury

² *Super-tax and Surtax*. A company, like an unincorporated individual, is assessable to income tax in respect of income derived from the ownership or occupation of land or from the carrying on of a business, under Schedule A (the so-called landlord's property tax) and other Schedules. Its profits until distributed are its income and not the income of the shareholders. When they are distributed by way of dividend, the dividends are income of the shareholders. So far as income tax is concerned, the owner of property gains something by incorporation; for he can at least obtain the relief appropriate to earned income in respect of director's fees and management salary paid to him by the company. As regards super-tax or (since 1928/9) surtax, he gains much; for many expenses which could not be deducted under Schedule A assessments on an owner could be deducted in ascertaining the profit earned by a company which carried on the business of a landowner. See the discussion on this point in *Simpson v. Grange Trust, Ltd* [1934] 2 K. B. 317. A company is not assessable to super-tax or surtax at all. It was only distributed profit that attracted super-tax or surtax in the hands of the shareholders. Profits of the company carried to its reserve account and not distributed by way of dividend therefore bore no super-tax until s. 21 of the Finance Act, 1922, came into force 'with a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed.' The section was passed to strike at the practice sanctioned by a majority of the House of Lords in *Inland Revenue Commissioners v. Blott* [1921] 2 A. C. 171, when it was held that, where the articles of the company contained appropriate provisions, reserves could be capitalized and distributed among the shareholders in the form of bonus shares, which being stamped with the nature of capital did not attract super-tax. S. 21 of the Finance Act, 1922, has been amended by s. 31 of the Finance Act, 1927, and under the joint operation of these sections the Special Commissioners have power, in effect, to treat as distributed and apportioned among the shareholders of certain private companies accumulated profits of the company not reasonably necessary for reserve and development.

has watched its growth with a careful eye, and the Finance Act, 1930, contains provisions which have the effect of severely circumscribing it in relation to estate duty as from the passing of that Act. Sections 34 to 38 thereof constitute a landmark in the development of the device which calls for separate treatment, and it is proposed to deal with the whole topic under three main heads: the problem set to the conveyancer; the solution and its working out; and the effect of sections 34 to 38 of the Finance Act, 1930.

II.

The problem shortly stated.—The problem set to the conveyancer is this: given the statutory provisions under which certain property of an owner, X, will become liable to estate duty on his death, how can that property be put in such a legal position that though X retains during his life enjoyment of a substantial part of the profits and control over the management, still on his death liability to estate duty shall either not arise or shall be minimized? It is a question purely of legal principles and legal machinery. Our Courts have always steadily adhered to the principle that liability to any tax depends upon whether the particular facts or the particular transaction in each case fall within the words of the statute imposing the tax and not upon the motive or intention of the parties. As Farwell L.J. has said³: 'I know of no law which prevents a man from avoiding a duty which has not attached to the property . . . a man is perfectly entitled, if he can, to avoid the payment of duty by disposing of his property in any way not forbidden by the Act. The argument that his motive is to escape duty appears to me wholly irrelevant, because a man is perfectly justified in avoiding and escaping the duty which will arise in the future, but which has not yet attached to any property which he possesses.'

Fifteenth century analogy.—There had been a previous widespread attempt of landowners to put their property into such a legal position that onerous liabilities arising on death might be escaped. We are accustomed to think of the use principally as the original of the trust, but one of the great reasons for its employment was the avoidance of feudal incidents arising on the death of the freehold tenant, the burdens of which—relief, wardship, marriage, etc.—fell upon the heir. Here the early conveyancer used the tool which lay ready to his hand, namely joint tenancy. Joint tenants being seised *per my et per tout* until severance, no heir became entitled until the last

³ *Att.-Gen. v. Duke of Richmond* [1908] 2 K. B. 729, 743.

survivor died. Accordingly the burdens attaching on the death of a tenant seised according to the common law were readily avoided by vesting the common law fee simple in a number of joint feoffees to uses, and, as deaths occurred in their ranks, vesting it in a fresh set of joint feoffees. Behind this wall of joint tenants, as Maitland called them, the *cestui que use* could live in such comfort as those days afforded, and die in the knowledge that his successors would escape the bulk of the feudal incidents, as well as the danger of escheat, whether *propter defectum sanguinis* or *propter delictum tenentis*. The device was eagerly accepted and the practice was widespread. The injury done to the royal revenue was one of the many causes which led to the passing of the Statute of Uses. Sir William Holdsworth tells the tale at length.*

The Finance Act, 1894.—The conditions under which liability to estate duty arises are to be gathered from certain sections of the Finance Act, 1894, read with certain statutory amendments and judicial interpretations. Consideration of the relevant sections may aptly be prefaced by an extract from the speech of the Chancellor of the Exchequer who introduced the bill, a Victorian of the Victorians, a representative of many great and famous families, who left emblazoned on the ceilings of the guest room in Trinity College the arms of some of the great houses from which he came, a holder of many offices, and the first of the line of Whewell Professors—Sir William Harcourt:—

‘The proposal of the Government, therefore, is this: We propose to clear the ground by abolishing or merging the present Probate Duty, the Account Duty, the Estate Duty, and the addition made by the right hon. gentleman opposite to the Succession Duty and to start afresh. We constitute in their place a single duty of the A class, of which probate is the type, which we propose to call the *Estate Duty*. We borrow the right hon. gentleman’s principle, and we borrow his name. We carry out his principle, however, to its legitimate conclusion. The Estate Duty will be charged according to the principal value of all property, whether real or personal, settled or unsettled, which passes on the death of any person, whether by the disposition of the deceased or by a settlement made by others. That is the broad and general principle. In this duty regard will only be had to the sum total of the property passing, and not at

* History of English Law, IV, 407 *et seq.*

all to the persons to whom or the shares in which it passes. The governing principle is this: Upon the devolution of property of all descriptions the State takes its share first—before any of the successors in title or beneficiaries. The reason on which this is founded is plain. The title of the State to a share in the accumulated property of the deceased is an anterior title to that of the interest to be taken by those who are to share it. The State has the first title upon the estate, and those who take afterwards have a subsequent and subordinate title. Nature gives a man no power over his earthly goods beyond the term of his life. What power he possesses to prolong his will after his death—the right of a dead hand to dispose of property—is a pure creation of the law, and the State has the right to prescribe the conditions and limitations under which that power shall be exercised. The right to make wills or settlements or successions is the creation of positive law. In case of default of disposition by intestacy, the State settles the destination of the property under the Statute of Distribution. It is most important to keep that clearly in view. The objection is often taken that taxes of this kind are so hard upon this person or that person, but a duty like the Probate Duty, where property is bequeathed by will, knows nothing of distinctions of persons who are to be benefited by the will. We deduct the share of the State, and then the persons interested take according to their several shares. Suppose a man leaves property amounting to £100,000, the Probate Duty, which will now be the Estate Duty, is deducted before anyone gets anything. The deduction may be £4,000. What really belongs to the beneficiaries is not £100,000, but £96,000, and they never had a right to anything more. That is the principle of the new Estate Duty. Those who laugh cannot have read the most elementary books on political economy and finance. The State is to take its share from the *corpus* of the whole property passing on the death of the deceased, of whatever kind or description that property may be. That principle is so simple and so just. I never supposed till this moment that that was a principle which anyone disputed. It is a principle which has been laid down in this House for a very long time, and it has been laid down in every work that has ever professed to deal with political economy. Therefore I was not prepared to argue it. I have taken it as an axiom of finance. The real difficulty arises in the application of the principle.'

Such is the political philosophy of the Chancellor who in cheerful mood remarked, 'We are all socialists now.' Did he ever dream that his new duty would ultimately result in dukes and earls turning themselves into governing directors of private companies?

Fundamental principles of estate duty.—In approaching the sections, certain fundamental principles of estate duty should be borne in mind.⁵ (1) It is a tax on the principal or capital value of all property 'passing' or 'deemed to pass' on death. (2) Save in one class of cases the amount of benefit which any person or persons actually derive from that passing is immaterial. (3) The principal value on which duty is payable is the price which in the opinion of the Commissioners the property passing would fetch if sold in the open market at the death of the deceased, no reduction being made on account of the collateral factor that the whole of the property must be taken as coming into the market at the same time. (4) All property passing on the death of the deceased (save property in which he never had an interest, such as property in regard to which he was merely *cestui que vie*) is aggregated so as to form one estate for the purpose of determining the rate of duty. (5) The rate is steeply graduated according to the value of such total estate.

Section 1.—Estate duty is to be levied and paid upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person after July 31, 1894. The word 'passes' was not a word of art, but was taken from ordinary speech.⁶ By a bold generalization, it may be said that property 'passes' whenever there is a change through death in the beneficial enjoyment of that property. Thus when the legal and beneficial ownership are united in A the property passes on A's death; but when the legal ownership is in A and the beneficial ownership in B, or in B and C successively, the property does not pass on A's death, and no claim to estate duty arises upon the devolution of A's trusteeship.⁷ There is a passing on the death of B, whether tenant for life or tenant in fee simple or absolute owner, in the examples given.

⁵ The principles of legacy duty (see the Legacy Duty Act, 1796) and succession duty (see the Succession Duty Act, 1853) are quite distinct from those governing estate duty, and are generally regarded as much more rational. These duties, or one of them, is generally payable upon death, but their rates and incidence are very much lighter than those of estate duty, and depend upon the benefit taken by the legatee or successor.

⁶ It was doubtless deliberately chosen, as the Divisional Court, in a then recent case of account duty, had commented on the width of the term; *Att.-Gen. v. Chapman* [1891] 2 Q. B. 526.

⁷ S. 2 (3) produces this effect by cutting down the wide general terms of s. 1.

Section 2 (1).—Section 2 (1) goes further. It was intended to preclude evasions, and it serves in cases where there is no real passing. Section 1 and section 2 (1) are mutually exclusive.⁸

By section 2 (1) (a) property of which the deceased was at his death competent to dispose is 'deemed to pass.' If X has a general power of appointment over certain property, it passes whether he does or does not exercise the power.

By section 2 (1) (b) property in which the deceased or any other person had an interest ceasing on the death of the deceased is 'deemed to pass' to the extent to which a benefit accrues or arises by the cesser of such interest.⁹ If X has a rentcharge or annuity of £500 a year for his own life or for the life of Y charged on property producing £1,500 a year, on X's death one-third of the capital value of the property is deemed to pass. X is to be regarded as if he were tenant for life of so much of the property charged as would produce his rentcharge or annuity. Estate duty becomes payable upon the capital value of that notional slice.¹⁰ When this doctrine is related to the principle of aggregation, some curious results ensue. Blackacre and Whiteacre are exactly similar properties each worth £4,000, and each bringing in £200 a year. Blackacre belongs to Jones subject to a life annuity of £100 a year in favour of Smith. Whiteacre belongs to Brown subject to a life annuity of £100 a year in favour of Williams. Smith dies aged 100 leaving £1,000,000. Williams dies on the same day aged twenty-five leaving £5,000. In respect both of Blackacre and Whiteacre one half of the capital value passes. Jones pays estate duty on £2,000 at 40 per cent. = £800. Brown pays estate duty on £2,000 at 4 per cent. = £80. It is unwise to charge an estate with annuities; but if it is done, let the annuitant be a person who is unlikely to die possessed of valuable free property. Aggregation plays strange tricks.

By section 2 (1) (c) property is made liable to estate duty in certain cases, notwithstanding that it may have been disposed of by the deceased during his lifetime, provided that if the disposition had never been made the property would have passed on the

⁸ *Earl Cowley v. Inland Revenue Commissioners* [1899] A. C. 198, at pp. 210–213, *per* Lord Macnaghten.

⁹ But exclusive of property in which the interest of the deceased or other person was only an interest as holder of an office (*e.g.* the trusteeship of a settlement carrying a reward of £200 per annum : *Att.-Gen. v. Eyres* [1909] 1 K. B. 723) or as recipient of the benefit of a charity (*e.g.* the inhabitation of an almshouse) or as a corporation sole (*e.g.* bishop, dean or parson).

¹⁰ See s. 7 (7) as to ascertaining the extent of the benefit accruing. The doctrine is known as the slice theory.

death of the deceased.¹¹ Its effect, read with subsequent amendments, can be shortly stated as follows: (α) Property disposed of by the deceased in his lifetime in a true business transaction for which he receives full consideration in money or money's worth is taken right out of section 2 (1) (c) by section (3). (β) Property which the deceased had transferred more than three years before his death to another person without reserving any interest therein, and which had been taken and enjoyed by the transferee to the entire exclusion of the deceased, is not within section 2 (1) (c). (γ) Property voluntarily transferred to another within three years before death, and also property transferred at any time where a benefit was reserved to the deceased, or where the alienee did not take exclusive enjoyment and possession, passes on death and is liable to estate duty. (δ) Property settled by the deceased otherwise than by his will, and, if by deed whether for valuable consideration or not, whereby an interest in such property for life is either expressly or by implication reserved to the deceased, or whereby the deceased reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property, passes on death and is liable to estate duty. In illustration of the effect of section 2 (1) (c), let it be supposed that A settles property upon trusts under which, during his life, the income is to be applicable at the discretion of the trustees for the benefit of the members of a class of which A is a member, and subject as aforesaid the capital and income are to be held for B. No member of that discretionary class has any proprietary interest whatever in any part of the income arising during A's life.¹² The trustees need not select A to receive a penny. Nevertheless upon the death of A estate duty attaches to the principal value of the whole of the settled property.¹³

Section 2 (1) (d) is not in point for the present purpose.

Finance Act, 1900, s. 11.—In 1900¹⁴ there arose a test case. A tenant for life of a settled estate surrendered her life interest to the remainderman and died within a year.¹⁵ The Crown claimed estate duty on the capital value of the property on the death of the former tenant for life, relying on sections 2 (1) (c) and 7 (7). The Court of Appeal rejected the claim on the footing that the property did not pass, and could not be deemed to have

¹¹ This sub-section is a glaring example of legislation by reference.

¹² *Re Coleman* (1888) 39 Ch. D. 443.

¹³ *Att.-Gen. v. Farrell* [1931] 1 K. B. 8, following *Att.-Gen. v. Heywood* (1887) 19 Q. B. D. 326. The last case was decided in a Common Law Court before the decision in *Re Coleman* (last note).

¹⁴ *Att.-Gen. v. De Prévile* [1900] 1 Q. B. 223.

¹⁵ At this date the relevant period was one year and not three years.

passed, upon her death at all. The Legislature moved at once, and by section 11 of the Finance Act, 1900, enacted that in the case of a person dying after March 31, 1900, property, real or personal, in which the deceased or any other person had an estate limited to cease on the death of the deceased should be deemed to pass on the death of the deceased notwithstanding that the life estate had been surrendered (whether for value or otherwise) for the benefit of the persons entitled in remainder, unless the surrender was *bona fide* made more than three years before the death of the deceased and *bona fide* possession of the property was immediately assumed and retained to the entire exclusion of the life tenant and of any benefit to him by contract or otherwise.

Finance Act, 1930, s. 39.—A further test case in 1924¹⁶ revealed a gap in section 2 (1) (c) as amended. It did not cover the case where a person entitled to a life rentcharge upon property surrendered that rentcharge. The gap has been closed by section 39 of the Finance Act, 1930.

It is now possible to appreciate the difficulty of the problem set to the conveyancer. He is required to settle instruments under which Blackacre, to which X is absolutely entitled, will not attract estate duty on death. At the same time X desires during his life to retain full control over the property and to enjoy at any rate a substantial proportion of the income arising from it. The problem was also put to him in a slightly more complicated form, where X is tenant for life in possession, and his eldest son Y is tenant in tail in remainder, of Whiteacre.

III.

The outline of the solution.—The enactments above considered show that unless X divests himself of all estate and interest in Blackacre (or Whiteacre, as the case may be) the instructions cannot be carried out. The conveyancer turned to company law. The memorable case of *Salomon v. Salomon & Co., Ltd.*¹⁷ established beyond all doubt that a private company incorporated under the Companies Acts is an entirely distinct person from its corporators and each of them, notwithstanding that the corporators consist of what may be termed one real person and a minimum number of dummies. What if the Blackacre Estate Co. were to be formed¹⁸ as a private company and

¹⁶ *Att.-Gen. v. Lane Fox* [1924] 2 K. B. 498.

¹⁷ [1897] A. C. 22.

¹⁸ The nominal capital will be adjusted to the amount of the purchase-moneys. It is unlikely that any further working capital will be required. If X is prepared to forgo the advantages of limited liability (which are not very great in practice

Blackacre be sold or agreed to be sold¹⁹ to it by X for *valuable consideration* to be satisfied in shares of the company credited as fully paid? ²⁰ Neither section 1 nor any limb of section 2 (1) would be applicable on X's death in respect of Blackacre itself, but only in respect of the shares so far as they remained vested in X at his death, or so far as he might fail to dispose of them in his lifetime so as to avoid section 2 (1) (c). X could be made managing or governing director of the company for his life and receive a substantial salary which would be earned income for the purposes of income tax and for which no liability to estate duty would attach on his death. The company could grant him a lease or periodic tenancy of the mansion-house, grounds and sporting rights. Life with X would go on much as before save for the necessary few formal meetings of the company each year. But (1) X would have divested himself of all legal and equitable estate and interest in Blackacre; (2) by receiving the purchase-money in shares X would be able to arrange his affairs so that liability to estate duty on his death in respect of the shares would be capable of being minimized if not altogether avoided; (3) the control of Blackacre would remain in X's hands as an officer of the company. These desiderata could only be concurrently achieved by the device of a sale to a company.

Characteristics of the company.—The Blackacre Estate Co. should invariably be a private company within the meaning of section 26 of the Companies Act, 1929. Its articles of association must therefore restrict the right to transfer its shares, limit the number of its members (exclusive of employees) to fifty, and prohibit any invitation to the public to subscribe for any shares or debentures. The minimum membership required is two only (as opposed to seven in the case of a public company), and it will not be necessary to file the annual balance sheets. The articles of association should provide for shares of different classes, if desired, and for all real power to be vested in Mr. X as life governing director. The memorandum of association should, by its objects clause, provide for all possible powers which such a land company may desire to exercise, including dealings of every kind in real estate.

in such a company as this) the liability can be unlimited, and the 1 per cent. *ad valorem* duty payable on the nominal capital of the company will be saved.

¹⁹ If the sale transaction stops short of conveyance, stamp duty will be avoided. An estate contract should be registered against X, and subsequent dispositions of the land by the company can be carried through by the company's procuring a direct conveyance to the purchaser from X or his successors in title to the bare legal estate.

²⁰ The disposition of the shares is considered below.

Disposition of the shares.—Assuming Blackacre to be worth £80,000 and to produce a net income of £2,500, X continues to enjoy the mansion-house, grounds and sporting rights as a tenant of the company, and as additional income he will have his salary as governing director. (He may also receive dividends on preference shares if he chooses to take any such shares on original allotment.) If he wishes to provide only for a solitary son and to reduce the liability to estate duty on his death to a minimum, he will procure the whole of the shares of every class to be allotted to or for the benefit of such son absolutely. If X survives three years such shares will pass free from duty. If he wishes to make provision also for a wife and younger children, the wise way will be for X to take preference shares and a smaller salary: for although estate duty will be payable on any preference shares he holds at his death, it will not be payable again in respect of those shares on the death of his wife if by his will he bequeaths them to her for her life²¹ with remainder to the younger children in proportions. If the articles contain a provision authorizing the company to redeem the preference shares, then when X dies they can be cleared off and the eldest son as holder of the ordinary shares will be master of the situation. It will be seen that this arrangement and disposition of preference shares in effect enables X to provide jointure and portions. The question will arise on X's death as to how the preference shares are to be valued. Their principal value is the price which they would fetch on the open market. But here the subject-matter consists of preference shares in a private company which cannot *ex hypothesi* be sold in the open market. The method of computing their value was laid down in the Irish case of *Att.-Gen. v. Jameson*.²² According to that case the value was to be taken as the price which they would fetch upon a sale in an unrestricted hypothetical open market, but on the footing that the purchaser would acquire shares whose transferability would in future be restricted in the method provided by the articles. This doctrine was for many years applied in England, but by the recent decision of the majority of the English Court of Appeal (*Re Paulin*²³) it has virtually been superseded by a doctrine very much more favourable to the subject and correspondingly less favourable to the Crown. In fixing the capital value for the purposes of estate

²¹ See s. 5 (2) of the Finance Act 1894 read with s. 14 of the Finance Act 1914.

²² [1905] 2 Ir. Rep. 218.

²³ [1935] 1 K. B. 26.

duty under section 7 (5) of the Act of 1894, allowance is to be made in the first instance for the inherent quality of the shares, namely, that they can only be sold subject to the restrictions contained in the articles, among a restricted class of persons, at a restricted price. No doubt *Re Paulin* will be taken by the Crown to the House of Lords. Assuming that 20,000 seven per cent. cumulative preference shares have been dealt with in this way, the balance of shares in the company (say 60,000 or 65,000 ordinary shares of £1 each) will be held by the trustees to whom they were allotted upon trust for X's eldest son for an immediate interest. They will not earn much dividend, for X's salary as governing director together with the dividend on the preference shares will not leave much margin of profit with which to pay dividend on the ordinary shares. Upon X's death they will attract no duty if X has survived for three years. They will not be highly valued for duty if X fails to survive three years. On X's death his eldest son can procure the company to redeem the preference shares for £20,000. He will then either wind up the old company and form a new one, or (preferably) form a holding company to acquire the ordinary shares in the Blackacre Estates Co., and settle the shares in the holding company.

Method where land is in settlement.—So much for the position where X is tenant in fee simple of Blackacre. Turning to the case where Whiteacre is settled upon trust for X for life with remainder to his eldest son Y in tail, it will be recalled that owing to section 11 of the Finance Act, 1900, the surrender by X of his life estate to Y will not solve the problem. The procedure is almost identical with that described above as appropriate to the case of an absolute owner. Y disentails with X's concurrence, so that X remains tenant for life in possession and Y becomes tenant in fee simple in remainder. The actuarial values of X's life interest and Y's remainder are then ascertained, and X and Y now sell to the Whiteacre Estate Company in consideration of £80,000 to be satisfied by the issue of so many shares (ordinary, preference or both) to X, and of the balance (ordinary, preference or both) to Y, or to their respective trustee-nominees. An alternative course would be for X's share of the consideration to be satisfied by an annuity, or a salary as governing director, and a limited number of the preference shares, pursuant to a provision in the articles to that effect. Such an annuity, being purchased by X and not charged on Whiteacre, would not cause estate duty to be attracted on X's death.

IV.

Finance Act, 1930, ss. 34 to 38.—This solution of the problem was originally effective and comparatively simple, but in 1930 the Legislature intervened. It remains to notice shortly the effect of sections 34 to 38 of the Finance Act of that year. The two important sections are section 34 and section 35. Section 34 deals with the first case, that of transfer by an absolute owner to a company. Section 35 deals with the second case, that of transfer by a tenant for life and a remainderman to a company. The object of the sections is not to prevent the carrying out of the process, but to render it to some extent nugatory or ineffective in so far as capital values on which estate duty would have been payable thereby escape liability.

Applicability of section 34.—The application of section 34 is as follows:—

(a) There must be a death after August 1, 1930, of a person who has directly or indirectly made a transfer of certain property to a company of a character defined. (b) The transfer must have been made after July 31, 1918. (c) The transfer must be of property which if it had been in the disposition of the deceased at his death would have been property in respect of which estate duty would have been payable on the death.²⁴ (d) The transfers excepted²⁵ are as follows: (i) *Bona fide* sales where the consideration was received or receivable wholly by the deceased for his own use or benefit and was satisfied or to be satisfied either by a capital sum of a fixed amount or by shares in or debentures of a company, (ii) Transfers of, or incidental to, the transfer of a business not being a business which substantially consists in holding, managing, developing or dealing in land in Great Britain, (iii) Transfers of, or of any interest in, property which by virtue of section 35 is deemed to pass on the death, (iv) Transfers of patents or copyrights or of any moveable tangible property except money and securities, (v) Transfers where either the deceased or the company is acting in the capacity of trustee, factor, agent, receiver or manager. (e) The transfer must be to a company of a certain character, namely,²⁶ any body corporate wheresoever incorporated which either (i) is so constituted as not to be controlled by its shareholders or by any class thereof, or (ii) has not issued to the public, or in the case of a company about to make an issue of shares to the public, will not, when it has made that issue, have issued to the public more than half of the shares by the holders whereof it is con-

²⁴ S. 34 (2).

²⁵ *Ibid.*

²⁶ S. 38.

trolled. When these conditions are fulfilled, if the deceased has received certain benefits from the company, then, in effect, those benefits are capitalized and estate duty is payable upon the capital value. For this purpose we have a computation based on two factors: (1) The amount of the 'benefits'; (2) The 'total income' of the company.

Calculation of benefits.—The method of calculating the 'benefits,' put shortly, is as follows: You take the three years before the death (or less period if the company has not been in existence for the three years) and ascertain the total benefits which the deceased has received in each of those years.²⁷ The benefits so referred to are the following²⁸: (i) Any payments made whether for consideration or not to or for the benefit of the deceased *other than* dividends in respect of shares in the company, interest on and repayments in respect of money lent to the company, payments of or on account of purchase-money under a *bona fide* sale (where that purchase-money is a capital sum of a fixed amount), and payments of or on account of royalties, not being royalties limited to cease at the death of the deceased. (ii) Any right in or enjoyment of any land. In ascertaining the value of a benefit consisting of a payment, deduction is to be made of any income tax (but not surtax) paid by the deceased in respect thereof. The value of any benefit from the enjoyment of land is to be computed by reference to the annual value of that land as ascertained for the purposes of income tax, due allowance being made for any rent paid by the deceased.²⁹

Total income of company.—'The total income' of the company means roughly³⁰ the income of the company from every source computed in accordance with the provisions of the Income Tax Acts for each year. No deduction is to be made for any payment to the deceased except dividends on preference shares in, and interest on money lent to, the company; but deductions are to be made for income tax paid or borne by the company, interest on money lent to the company, dividends on preference shares, and the rents, royalties and other payments by the company on which income tax is deducted at source.

Ascertainment of value deemed to pass.—Having these two factors, you must now ascertain in each of the three years the proportion which the total value of the 'benefits' received in each year bears to the 'total income of the company' in the same year, and if the average of the proportions so computed

²⁷ S. 34 (1).

²⁹ S. 34 (3).

²⁸ S. 34 (2).

³⁰ S. 34 (4).

exceeds 50 per cent., then for purposes of estate duty there shall be deemed to pass on the death such sum of money (not exceeding the value of the total assets of the company) as bears to the said value the same proportion as the average proportion.³¹ There are provisions to prevent section 34 overlapping with section 35, and also provisions for reduction when the property transferred has fallen in value since the transfer and before the death.³² The 'value of the total assets of the company' is defined by section 38. It means the principal value under section 7 (5) of the Finance Act, 1894, of all the assets of the company as a going concern including goodwill after deducting therefrom (i) the par or redemption value (whichever is the greater) of any debentures, debenture stock and preference shares, (ii) debts of the company, (iii) such a sum as fairly represents any future or contingent or uncertain liability, (iv) any reserve fund separately invested which is *bona fide* intended to be applied in payment of pensions to employees, etc.

Applicability of section 35.—Section 35 applies where a transfer has been made after July 31, 1918, by X tenant for life and Y remainderman or reversioner directly or indirectly to or for the benefit of a company of the character already mentioned and X dies after August 1, 1930. The transferred property is deemed to pass on the death as if the share or interest of the deceased therein had continued until his death, unless the share of the consideration was satisfied otherwise than by an allotment of shares or the grant of an annuity, or other right to receive periodical payments (not being payments on account of capital purchase-money of a fixed amount) or the deceased had at least three years before his death relinquished all interest in the property and had not at any time within those three years the possession or enjoyment thereof (otherwise than at a rack rent), or of any benefit secured to him whether by contract or otherwise and was not in receipt of any payment from the company otherwise than in respect or on account of debentures, loans or purchase-money being a capital sum of a fixed amount. In determining the value of any property so deemed to pass there shall be deducted from the principal value thereof³³ (1) Sums borrowed by the company and applied in the improvement of the property, and not at the death repaid by the company. (2) A sum equal to the capital sum of money paid to the deceased as part of the consideration for the transfer, and, where estate duty is payable in connexion with the death on

³¹ S. 34 (1).

³² Proviso to (1) (ii) of s. 34.

³³ S. 35 (2).

any shares of or debentures in the company, a sum equal to the principal value of such of those shares or debentures as were transferred or allotted to the deceased in consideration of the transfer of the property. It is very important to notice that property which is 'deemed to pass' on a death under sections 34 and 35 is an estate by itself and is not to be aggregated with any other property.³⁴

Section 36.—Section 36 provides that estate duty payable under section 34 or section 35 is a debt due to His Majesty from the company, and it is the company which is accountable.

Section 37.—Section 37 deals with the valuation of shares in companies (not being preference shares) to which sections 34 to 38 of the Act apply, passing on the death of a person dying after August 1, 1930. In such a case if either (a) a sum of money computed by reference to the value of the total assets of the company is deemed to pass under section 34, or (b) the 'control' of the company was immediately before the death in the hands of the deceased, then the principal value of those shares is to be ascertained by reference to the value of the total assets of the company and not in the manner provided by section 7 (3) of the Finance Act, 1894; and *Att.-Gen. v. Jameson* and *Re Paulin* will not be applicable: provided that in cases falling within paragraph (a) the value of the total assets of the company shall be deemed to be reduced by the sum of money therein referred to. The 'control' of a company is deemed to be in the hands of a person if (a) he has control or more than one-half the voting power of the company, or (b) the company is so constituted that he controls it through the directorate, or (c) he has otherwise the right to receive or the power to dispose of more than one-half of the income of the company. This section does not apply to shares which have within twelve months before the death been the subject of dealings on or have been quoted in the official list of a recognized stock exchange in the United Kingdom.

³⁴ S. 34 (7), s. 35 (3).

NOTES ON RECENT CASES.

CONFLICT OF LAWS—PURPORTED CONFISCATION BY SPANISH STATE OF
PROPERTY OF FORMER KING OF SPAIN—INDIRECT ENFORCEMENT OF
FOREIGN PENAL LAW REFUSED.

Banco de Vizcaya v. Don Alfonso de Borbon y Austria. [1935]
1 K. B. 140.

MANY years before his abdication in 1931, the defendant, who was then King of Spain, purchased certain securities with his private money and deposited them with the W. Bank, London, to the order of its Madrid Branch as the defendant's agents. In September, 1923, this branch was about to be closed, and the defendant instructed the W. Bank to hold the securities to the order of the plaintiff bank as the defendant's agents. These instructions were carried out by the Head Office of the W. Bank in London sending the securities to its Foreign Office Branch to be placed 'under the dossier of the plaintiffs' rubric Don Alfonso de Borbon y Austria.'

In May, 1931, after the defendant's abdication, by a decree of the President of the Provincial Government of the Spanish Republic all private property of the defendant in Spain was seized and bankers in Spain, who had any such property in deposit, were ordered to surrender it to the Treasury: and in November, 1931, by a decree of the constituent Cortes of Spain, the defendant was declared guilty of high treason and it was decreed that all his property, rights and grounds of action should be seized for its own benefit by the Spanish Republic. The defendant and the plaintiff bank both claimed the securities from the W. Bank, who interpleaded. The issue was ordered to be tried with the Spanish Bank as plaintiff.

Lawrence J. held that the substance of the right sought to be enforced by the plaintiffs was the delivery to them of the securities in question, and that the enforcement of that right would directly or indirectly involve the execution of what were undoubtedly the penal laws of a foreign State. Such laws would not be enforced by English Courts and the plaintiffs must therefore fail. To the contention of the plaintiffs that, though the decrees might be penal, the plaintiffs' claim was not a penal action because they were not asserting the right of the Spanish Republic but their contractual right against the W. Bank, the learned judge answered that the plaintiffs were not asserting their contractual rights as they originally existed but as altered by the decrees of the Spanish Republic; nor were they in substance asserting their own rights at all but the rights of the Spanish Republic. In short the only way in which the plaintiffs could assert their claim that they were entitled as against the defendant, was by virtue of the penal decrees.

This case exemplifies the application of what Dr. Cheshire describes as 'one of the oldest rules of English law', i.e. that English Courts will

not enforce the penal laws of a foreign country. The Privy Council in *Huntington v. Attrill* [1893] A. C. 150 gives 'the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed' (at p. 157). In the case above the Spanish Bank must have been suing on behalf of the Spanish Government, as it claimed no beneficial interest in the securities for itself. Hence the action fulfils the requirements of a penal action and the rule applies.

If, however, the property, when confiscated, is in the territory of the State enacting the confiscatory order and eventually finds its way to England the confiscation will be recognized as valid by our Courts (*Aksion-airnoye, etc. Luther v. James Sagor & Co.* [1921] 3 K. B. 532), where Bankes L.J. says (at p. 546) that such an order must be treated 'as the expression by a *de facto* government of a civilized country of a policy which it considered to be in the best interest of that country.'

However, the interest of the case under discussion would appear to lie, not in the enunciation of the above rule, which was undisputed, but in the ascertainment of the nature of the defendant's rights with regard to the securities. If he possessed merely a right of action against the plaintiffs—a right in the nature of that of *cestui que trust* against his trustee—presumably such chose in action would be situated in Spain, and become extinguished by the confiscation order. If, however, the defendant retained a proprietary right in the securities—a right in the nature of that of a bailor *qua* the goods bailed—and the plaintiffs were merely his agents for regulating their disposal, such proprietary rights would be situated in England, and would not be caught by the confiscation order. The latter seems to have been regarded as the correct view.

It is, perhaps, worthy of note that ex-King Alfonso has recently succeeded in a similar case tried by the Italian Courts (see *The Times*, Feb. 1, 1935).

H. F. MACM.

CONTRACT—INFANT—CONTRACT FOR BENEFIT OF INFANT—AGREEMENT TO ABIDE BY RULES OF BRITISH BOXING BOARD OF CONTROL AND BY ANY ALTERATION OF RULES—ALTERED RULES BINDING ON INFANT IN ABSENCE OF NOTICE.

Doyle v. White City Stadium. [1935] 1 K. B. 110.

JACK DOYLE, an infant, procured from the British Boxing Board of Control a licence to box, agreeing to abide by the rules of that body as existing and as amended. Regulation 20, paragraph 16, which provided that a boxer's money might be stopped only when he was disqualified 'for committing a deliberate foul, for not trying, or retiring without sufficient cause, or if the referee gives a no contest decision' was altered to read: 'Boxers in case of disqualification are only entitled to receive bare travelling expenses pending the decision of the board . . . when the board . . . may deal with the money as it thinks fit.' No notice of the alteration was given to the plaintiff.

The plaintiff agreed with Jeff Dickson's Company to box Petersen at

the White City Stadium on the terms that he should receive £3,000 win, lose or draw. He was disqualified for a foul, but not a deliberate foul. Under the amended reg. 20, para. 16, the B. B. B. C. stopped his prize money and paid £5 each to Doyle and his mother for twenty-six weeks. Doyle brought proceedings to recover the £3,000 from White City Stadium, Ltd. and the B. B. B. C.

MacKinnon J. dismissed the action against White City Stadium, Ltd., on the ground that the contract for the payment of the £3,000 was made not with them but with the promoters. He gave judgment against the B. B. B. C., holding that the contract for the licence was binding on Doyle, notwithstanding his infancy, because it was analogous to a contract for employment and for his benefit, but that the amended rule was not binding until he had notice of it.

The Court of Appeal affirmed MacKinnon J.'s decision that the contract was binding, but reversed his decision as regards the altered rule.

In holding that the contract was binding the Court applied *Clements v. L. N. W. R. Co.* [1894] 2 Q. B. 482. It was, in the words of Slesser L.J. in the case before us (at p. 133), 'so associated with the class of contract of service which an infant may make so as to be binding upon him that it was binding upon him,' although it was not in fact a contract of service. For a licence to box was essential to the infant's earning his living.

Moreover, although it contained terms of forfeiture, it was nevertheless for the infant's benefit, which is the second element necessary to make the contract binding; 'it is as much in the interests of the plaintiff himself as of any other contestant that there should be rules for clean fighting and that he should be protected against his adversary's misconduct in hitting below the belt . . .' (*per* Lord Hanworth M.R. at p. 126).

MacKinnon J. held that there was an implied term in the contract that altered rules should not be binding without notice. The Court of Appeal reversed this, holding that no such term could be implied. The alteration of the rule was clearly valid, as it was not an alteration of the fundamental purpose of the B. B. B. C.: *Thellusson v. Viscount Valentia* [1907] 2 Ch. 1.

A. W. G. K.

CONTRACT—SALE OF GOODS—CONTRACT IN WRITING SIGNED BY BOTH PARTIES FOR THE PURCHASE OF AN ARTICLE—CLAUSE IN SMALL PRINT EXCLUDING 'ANY EXPRESS OR IMPLIED CONDITION, STATEMENT, OR WARRANTY, STATUTORY OR OTHERWISE'—NO MISREPRESENTATION BY SELLER AS TO TERMS OF THE CONTRACT—MACHINE OUT OF ORDER—ACTION BY BUYER AGAINST SELLER FOR BREACH OF IMPLIED WARRANTY OF FITNESS HELD NOT TO LIE.

L'Estrange v. F. Graucob, Ltd. [1934] 2 K. B. 394.

THE purchaser of an automatic slot machine signed and handed to the sellers an order form. This contained, in ordinary print, the essential terms of the contract, and, in small print, certain other special terms, one of which was 'any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded.'

The sellers then signed and sent to the purchaser a printed order confirmation, assenting to the terms in the order form. The machine was delivered and the purchaser paid the first instalment of the price. The machine did not work satisfactorily, and the purchaser brought an action in the county court against the sellers claiming (*inter alia*) damages for breach of an implied warranty that the machine was fit for the purpose for which it was sold. The defendants pleaded (*inter alia*) that a term of the contract expressly excluded all such implied warranties. To this the plaintiff replied that she signed the document under the impression that it was an order form, and that, when she signed it, she knew nothing of the condition on which the defendants relied. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract.

The county court judge gave judgment for the plaintiff. The defendants, in contending that all implied warranties were excluded by the condition in small type, relied upon the rule laid down in *Parker v. South Eastern Ry.* (1877) 2 C. P. D. 416, 421. The county court judge held that the present case was brought within the exceptions to that rule by reason of the fact that, as the conditions were printed in very small type, it was necessary, in determining whether the person signing the document knew of those conditions, to consider the reasonableness of their size. It was thus necessary to apply the tests laid down for such cases in *Richardson, Spence & Co. v. Rowntree* [1894] A. C. 217, namely:— (1) Did the plaintiff know that there was writing or printing on the document? (2) Did she know that the writing or printing contained conditions relating to the terms of the contract? (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? In the present case the judge found that the answer to the first question was in the affirmative while the answers to the second and third were in the negative, and so the defendants were not entitled to rely upon the condition which excluded all warranties.

This decision was reversed by the Divisional Court, where Scrutton L.J. pointed out that, in accordance with the rule in *Parker v. South Eastern Ry.*, where a person signs a document he is, in the absence of fraud or misrepresentation, bound by all the terms in that document, and it is wholly immaterial that the person signing has not read the document and does not know its contents. He then proceeded to distinguish the present case from ticket and other cases such as *Richardson, Spence & Co. v. Rowntree*. In this latter case the document in question was not signed by the parties but was merely written evidence of the agreement between them, and in such a case it is necessary to prove that the defendant was aware or ought to have been aware of the conditions contained therein. Where the document is signed, however, this case has no application, for the person signing is bound by all the terms contained in the document to which he affixes his signature. In the present case the plaintiff had signed the agreement, and so she was bound by the condition which excluded all implied warranties, and the defendants were entitled to judgment.

This case is decided in accordance with sound common sense principles. In the absence of any misrepresentation or fraud, a person should quite clearly be entitled to act upon a signed document, without fear that the person signing will be able to retract from his obligations under that document. This may seem a hard case, and it is regrettable that an

important condition should be in such small print, but it is common sense that any liability for overlooking the condition must rest with the person signing the document, and not with those who afterwards acted upon the signature to the document.

G. O. P.

CONTRACT—SALE OF GOODS—DAMAGES—CARRIER'S LIABILITY FOR SHORT DELIVERY—LOSS OF RESALE CONTRACTS—MEASURE OF DAMAGES IN CONTRACT AND TORT.

The Arpad. [1934] P. 189.

X BOUGHT from Y a cargo of wheat to be shipped from a Black Sea port to Hull in the *Arpad*, a ship owned by Z. X bought 'as per sealed sample No. 727' and resold the wheat to various purchasers almost immediately.

The shipowner, Z, delivered the cargo five months later, 47 tons short. No wheat corresponding with sample 727 could be bought in Hull at the time, so the respondents could not fulfil all their contracts. During the five months the price of wheat had everywhere sunk, so that the price for which X had sold was exceptionally high. X sued on the contract with Z, the shipowner, and also for conversion. X claimed the amount of the profits he would have made on the resale, or at least the price he had paid.

This was an appeal from a decision of Bateson J. confirming the report of the Registrar on a reference to assess damages; he had awarded the price paid. In the Court of Appeal Greer and Maugham L.JJ. (Scrutton L.J. dissenting) awarded the price at which in view of the general level of prices the goods could have been sold in open market at the time of breach of the contract, on the following grounds:—

(1) The plaintiff must be restored to the position in which he would have been had the contract been carried out; he must be given the value of the goods.

(2) But the value must be taken independently of any circumstances particular to the plaintiff (Lord Esher in *Rodocanachi v. Milburn* (1886) 18 Q. B. D. at p. 76; in that case the value was assessed at the market price although the plaintiff had contracted to sell at a lower price). Here, therefore, damage arising from loss of an extrinsic sub-contract satisfied neither of the rules in *Hadley v. Baxendale* (1854) 9 Ex. 341.

(3) The 'value' at the date of breach means the price for which X could sell the wheat in the ordinary market; to make a market and a market price it was not necessary for them to be able to buy similar wheat.

(4) Although actual sub-sales before the date of breach may be evidence of the market price at the date of breach (*France v. Gaudet* (1871) L. R. 6 Q. B. 199; *Stroud v. Austin* (1883) 1 C. & E. 119) yet they are only evidence, and scant evidence where a considerable time has elapsed, as here; moreover such evidence can be rebutted by proving that prices have since dropped (as was proved here).

(5) Even if an action lay here in tort (which Maugham L.J. doubted) the damages must be the same. Greer L.J. quoted with approval (at p. 216) a *dictum* of Scrutton L.J. in *The Edison* [1932] P. at p. 61) r.

'Generally . . . it is clear on the authorities that the measure of damages . . . is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort.' Maugham L.J. said that 'as between seller and buyer it has been decided that the buyer cannot recover larger damages in tort than in contract' (at p. 233). He said that 'in tort (as in contract, unless notice to the defendant has affected the matter) the wrongdoer is responsible in damages only for the "natural and direct result of the wrongful act"' (at p. 232).

Maugham L.J. restricted the terms of his judgment on this point to cases without circumstances of aggravation, and where the real ground of action is the breach of a contract to deliver (at p. 234); Greer L.J. desired to say nothing of the case of personal injuries causing inability to perform a valuable contract (at p. 221).

Essentially, the rule of damages appears to be that there is liability for damage, whether or not such as might reasonably supposed to be in contemplation, resulting from a tort (*Re Polemis*) or, under the first rule in *Hadley v. Baxendale*, from a breach of contract (*Vaile Bros. v. Hobson* (1933) 149 L. T. 283) directly, and not in combination with extraneous circumstances. Further there may be liability under the second rule in *Hadley v. Baxendale* (but not in tort) for damage not satisfying this test, if contemplated at the time of contract. What then are extraneous circumstances? It appears from *The Arpad* that in a case of breach of contract to deliver, even if sued on as a technical tort, contracts of sale entered into by the plaintiff are extraneous. But *The Arpad* decides no more than that. For Maugham L.J. expressly limits his decision to precisely such cases, and Greer L.J. in his reservation at p. 221 (above) says 'a valuable contract', which apparently embraces more than the case of the habitually well-paid man who is injured, which case is of course simpler as he is a different kind of man. Moreover, in Admiralty running-down cases where a ship has to be laid up for repair, the value of the time lost will only be calculated on the basis of average and usual earnings if there are no actual engagements (Bowen L.J. in *The Argentino* (1888) L. R. 13 P. D. at p. 203)—a rule contrary to that in the present case. The decision in *The Arpad* therefore should be construed strictly; the general rule is still uncertain.

I. E. J.

CRIMINAL LAW—ASSAULT—CONSENT—HOW FAR CONSENT IS A DEFENCE—
BURDEN OF PROOF OF CONSENT.

R. v. Donovan. [1934] 2 K. B. 498.

D. was indicted at quarter sessions for (a) indecent assault and (b) common assault. He had induced H. to accompany him to a garage and had there beaten her with a cane, for purposes of sexual gratification, in circumstances of indecency. The medical evidence was to the effect that the condition of the girl's body showed that she had undergone a 'fairly severe' beating. D. had previously approached H. with suggestions that she should submit to such treatment, and it was proved that on certain occasions she had expressed her willingness to do so. The defence

was raised that H. had consented to the assault. The prosecution submitted that it was not necessary for absence of consent to be proved before the accused could be convicted. The Chairman ruled against this contention, and directed the jury to decide the issue of whether there had been consent to the assault or not, and to convict only in the absence of consent. D. was convicted and sentenced; he appealed on the ground that the jury had been misdirected; that it was for the prosecution to disprove consent in a case, such as this, where the facts proved tended to show that the injured party had consented to the assault. The Crown contended that consent, or the absence of it, was immaterial, and that therefore the conviction should stand.

The Court, in a judgment delivered by Swift J., quashed the conviction, on the ground that, assuming absence of consent to be vital to a conviction, the jury had been misdirected. The Chairman had put the issue before them as one of 'consent or no consent,' but he had omitted to direct them that the onus of proof of absence of consent lay on the prosecution when consent was a reasonable inference from the facts already proved. This rule had been clearly laid down in *R. v. May* [1912] 3 K. B. 572.

The Court also held that there had been a substantial miscarriage of justice, because the jury were probably induced to think that the only thing they had to decide was this question of consent.

The important part of the judgment, however, is that in which the Crown's contention that consent was immaterial is discussed. It was held that as a general rule it is an unlawful act to beat another with such violence that bodily harm is likely to result. When such an act is proved, criminal liability is not affected by the fact that the person injured has consented. To this rule there are exceptions, such as athletic sports, parental chastisement, or even horseplay of the type in *R. v. Bruce* (1847) 2 Cox C. C. 262, where there is no anger or intention to cause bodily harm. The present case did not come within any of these exceptions; if, therefore, the accused acted in such a way as to be likely to cause bodily harm, the consent of H. was immaterial. But the issue of whether bodily harm had actually been caused was for the jury to decide; they had received no direction to that effect; had they been properly directed they might conceivably have decided that no bodily harm had been caused; which fact afforded a further ground for quashing the conviction.

This decision attempts to draw somewhat more precisely the line between those types of assault in which absence of consent on the part of the person injured is an essential ingredient, and those in which it is not. There have been considerable divergences of opinion on this point. Sir J. F. Stephen inclined to the opinion that consent was a good defence to a charge of assault involving any violence not amounting to the infliction of mayhem (Dig. Crim. Law (7th ed.), Art. 290). Kenny states that consent is no defence when an assault involves the infliction of some extreme and causeless injury, or constitutes a breach of the peace (Crim. Law (14th ed.), 160). These opinions show that there was need for a clearer judicial statement of the law in this matter. The present decision is an amplification of a *dictum* of Cave J. in *R. v. Coney* 8 Q. B. D. 534, 539. 'If,' said the Court in the case before us, 'an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person . . . consents to it. No person can license another to commit a crime. So far as the criminal law is concerned,

therefore, where the act charged is in itself unlawful it can never be necessary to prove absence of consent on the part of the person wronged' (p. 507); and if blows struck are 'likely or intended to do bodily harm' (p. 509) consent will not make them lawful.

E. C. R.

CRIMINAL LAW—INDECENT ASSAULT ON GIRL UNDER SIXTEEN—DEFENCE OF REASONABLE AND BONA FIDE BELIEF THAT GIRL WAS OVER SIXTEEN IS NEVER AVAILABLE—CRIMINAL LAW AMENDMENT ACT, 1922, SS. 1 AND 2.

R. v. Maughan. (1934) 24 Cr. App. R. 130.

THIS was an appeal on certificate against conviction for indecent assault on a girl under sixteen. The appellant, who was aged twenty-two, had been charged with carnal knowledge of a girl under sixteen, and with indecent assault on the same girl. The indecent assaults alleged were admittedly the same acts as the alleged acts of carnal knowledge. The jury found that he had a *bona fide* and reasonable belief that the girl was over sixteen. He was, therefore, acquitted on the charge of carnal knowledge, under a proviso in section 2 of the Criminal Law Amendment Act, 1922, which allows such mistake to be a good defence for a man under twenty-three charged with such carnal knowledge for the first time. Section 1 of the Act dealt with the offence of indecent assault; since it contained no similar proviso, the prisoner was convicted on this count.

The appeal raised two questions: (i) whether the statute should be construed to apply the proviso in section 2 to the lesser offence in section 1; (ii) whether the common law defence of mistake was not in any case available here, in the absence of provision to the contrary.

The Court of Criminal Appeal dismissed the appeal. The first point in question had been specifically raised in an identical case before the same Court: *R. v. Forde* [1923] 2 K. B. 400. The Legislature had not seen fit to remedy the apparent absurdity of allowing conviction for indecent assault, when the very same act, charged as carnal knowledge, was excused by the proviso in section 2 of the statute (*supra*). There was no reason for the Court to adopt a different view as to construction of the statute from that adopted in *R. v. Forde*.

As regards the second point counsel for the appellant had cited *R. v. Green* (1862) 3 F. & F. 274, *R. v. Hibbert* (1869) 1 C. C. R. 184, and *R. v. Tolson* (1889) 23 Q. B. D. 168, to show that the common law defence of *bona fide* and reasonable mistake was good even where the prisoner had done something absolutely prohibited by statute. But in *R. v. Prince* (1875) 2 C. C. R. 154 the Court decided that a *bona fide* and reasonable belief that the girl was over sixteen was no defence to a charge of abducting a girl who was in fact under sixteen. The reason for that decision was simply that when an act is absolutely prohibited by statute, one who does such an act must be held to have taken the risk of offending against the statute. This was the very point at issue in the present case.

The view of *mens rea* expressed in this judgment appears to overrule principles laid down in both *R. v. Tolson* and *R. v. Prince*. The decision

may possibly be reconciled with the decisions in these two cases on the ground that the prisoner was in any event doing an immoral act. But the *ratio decidendi* conflicts with the rule apparently there laid down, that mistake of fact would be a valid defence unless the prisoner knew he was doing an illegal or immoral act. The judgment in the present case lays down that the doing of an act clearly and unconditionally prohibited by statute carries with it a conclusive implication of *mens rea*. The common law defence of mistake will never be available under such a statute.

B. W. S.

INTERNATIONAL LAW—PIRACY *IURE GENTIUM*—ACTUAL ROBBERY NOT AN ESSENTIAL ELEMENT.

Re a Reference under the Judicial Committee Act, 1833; Re Piracy Iure Gentium. (1934) 51 T. L. R. 12.

Two armed Chinese vessels pursuing and attacking a junk were stopped by other vessels and captured by H.M.S. *Somme*. Their crews, being taken to Hong Kong and tried for piracy, were found guilty subject to the question of law, 'Is robbery an essential element of piracy *iure gentium*?' The Full Court of Hong Kong decided it was, and the prisoners were acquitted. As a result, the question 'whether actual robbery is an essential element of the crime of piracy *iure gentium*, and whether a frustrated attempt to commit a piratical robbery is not equally piracy *iure gentium*' was referred by Order in Council to the Judicial Committee of the Privy Council, but not by way of appeal from the Hong Kong Court. The acquittal of the accused stood. The reference was of the type illustrated in Wade & Phillips, *Constitutional Law*, 156. The Judicial Committee held that actual robbery is not essential and that a frustrated attempt to commit robbery is equally piracy.

The authorities consulted were in conflict. Thus, in *Dawson's Case* (1696) 13 St. Tr. col. 451, Sir Charles Hedges said: 'Piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty.' By this definition, which in any case was given, like several others, only in a charge to a Grand Jury, if a sailor robs his fellow, this is piracy; which is absurd. But Hale too in his *Pleas of the Crown* requires robbery—'It is out of the question that piracy upon the statute is robbery', as does Blackstone (IV, 76)—'robbery and depredation upon the high seas'. Kent and Wheaton also declare robbery essential. In *U.S. v. Smith* (5 Wheaton 153) Story J., delivering the opinion of the Court, said that 'robbery or forcible depredation upon the sea, *animo furandi*, is piracy'. Ortolan, Bluntschli and Calvo also support this view. None of these definitions, however, is really adequate, for none takes sufficient account of the expansion of International Law.

In Anglo-American law the opinion seems derived from the misconstruction of a statute of 1536 (28 Hen. 8, c. 15). This removed from the cognizance of the Court of Admiralty to the Common Law Courts 'all felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea'. Attempted crime is only a misdemeanour, and so is not covered in so many words by the statute; a mere attempt

to commit robbery on the high seas was therefore considered no piracy. Coke, however (3 Inst. 112), states quite clearly that the statute altered only the jurisdictions of the Courts, the civil law of piracy formerly used being unaffected; this civil law is expounded in Molloy's '*De Jure Maritimo et Navali*'. Successful robbery is not there treated as essential; the assault is the essence of the offence.

For this the Court found support in Hawkins' *Pleas of the Crown*, Hall's *International Law*, Phillimore's *International Law*, two American decisions and the English case of *The Serhassan* (1845) 2 W. Robinson, Adm. Cas. 354, where an unsuccessful attack on a pinnace was held to be piracy. In the tentative definition published in 1927 by the League of Nations sub-committee, 'sailing the seas . . . with the object of committing depredations,' is the chief point. Their Lordships, while declining to give a definition themselves, referred to that given in Kenny's *Criminal Law*, 332 ('any armed violence at sea which is not a lawful act of war') as coming nearest to accuracy coupled with brevity; but they pointed out that this would include a mere shooting affray between two passengers on a liner, and they declined to regard that as piracy.

Indeed, on grounds of expediency alone, the view adopted by their Lordships is preferable. Sir James Stephen (Digest 162) says that any doubt 'is founded on the absence of any express authority for the affirmative (i.e. that piracy is possible without robbery) and on the absurdity of the negative.' And the Judicial Committee said that, 'when it is sought to be contended . . . that armed men sailing the seas . . . without any commission . . . could attack and kill everybody on board another vessel . . . without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of International Law' (p. 14).

This 'judgment', deciding no actual case, is therefore not binding on any Court. But it is highly probable that as the most exhaustive and authoritative inquiry into the problem so far, it will be accepted as the resolution of a disputed point of law of some importance.

C. H. L.

LANDLORD AND TENANT—BREACH OF NEGATIVE COVENANT—CAPABILITY OF BEING REMEDIED—NOTICE TO QUIT UNDER LAW OF PROPERTY ACT, 1925, s. 146 (1)—CONSTRUCTION OF STATUTE.

Rugby School (Governors) v. Tannahill. [1935] 1 K. B. 87.

THE defendant T. was lessee of certain premises in London owned by the plaintiffs—the governing body of Rugby School. The lease contained a covenant by the lessee and assigns 'not to permit the said premises to be used for any illegal or immoral purpose.' In January, 1934, T. was convicted of the statutory offence of permitting the premises to be used for habitual prostitution; whereupon the plaintiffs served on the defendant a notice to quit worded substantially as follows: 'We hereby give you notice, pursuant to s. 146 of Law of Property Act, 1925, that you have broken the covenant, etc. . . . and in the exercise of the right of

re-entry . . . we hereby require you to quit and deliver up the said premises.' Since her conviction the defendant had evicted her immoral sub-tenants and was prepared to undertake to the Court that she would in future take every care in the choice of her tenants.

Now Law of Property Act, 1925, s. 146 (1), provides: 'A right of re-entry . . . shall not be enforceable . . . unless and until the lessor serves on the lessee a notice (a) specifying the particular breach complained of; and (b), if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) *in any case*, requiring the lessee to make compensation in money for the breach'; and the lessee thereupon fails within reasonable time to fulfil both requirements. Accordingly it was contended for the defendant that the plaintiff's notice was bad in that it did not require the defendant either (1) to remedy the breach under sub-s. 1 (b), or (2) to make compensation under sub-s. 1 (c).

MacKinnon J. gave judgment for the plaintiffs on the grounds (1) that the covenant, because it was negative, could not be remedied; and (2) that on the construction of the notice followed in *Lock v. Pearce* [1893] 2 Ch. 271 the notice was valid. The Court of Appeal affirmed this decision. As to his first ground they held that the learned judge was right in deciding on the facts that this breach was not capable of being remedied. For, although the defendant had actually ceased 'to permit the premises to be used for any illegal or immoral purpose,' that in fact was no remedy of the breach: the very designation 'house of ill-fame' showed that damage to the plaintiffs was likely to continue long after the breach had ceased. But, while not actually deciding the point, they were of opinion that it was going too far to say that no breach of any negative covenant could be remedied.

On the second point, they held themselves to be bound by, and they also approved of, the Court of Appeal's decision in *Lock v. Pearce* (*supra*), in which a common-sense construction was put on section 14, Conveyancing Act, 1881 (the original of section 146, Law of Property Act, 1925). The sense of the section was clearly to benefit tenants by requiring a lessor to state exactly what he wants done, before bringing an action; and the construction of the statute must be in accordance with the common-sense meaning of the whole section, not with the literal phrasing of one sentence. As Lindley L.J. said there (at p. 279), 'Supposing the lessor does not want compensation, is the notice to be held bad because he does not ask for it? There is no sense in that.' Moreover, *Lock v. Pearce* had been followed by Russell J. in *Civil Service Co-operative Society, Ltd. v. McGrigor's Trustee* [1923] 2 Ch. 347, where the breach was, as here, incapable of remedy.

The case has two points of interest. First, it offers a very good illustration of the way in which the Courts will interpret a statute in a common-sense fashion: here, though the section clearly says '*in any case* to make compensation,' the Courts have held that this may not be necessary. And secondly,—Can the breach of a negative covenant be remedied? The Court of Appeal were probably right in doubting MacKinnon J.'s view: there are many cases imaginable—*e.g.*, a covenant not to build a wall, in which a breach could easily be capable of remedy. Accordingly, though only *obiter*, the *dicta* of Greer and Maugham L.J.J. would seem to represent the law.

SALE OF GOODS—GOODS OBTAINED ‘ON APPRO’ FOR FICTITIOUS PURCHASERS—SALE OF GOODS ACT, 1893, s. 18, r. 4; s. 25 (2)—PROPERTY HELD TO PASS WHEN BUYER ADOPTED THE TRANSACTION BY PLEDGING GOODS, EVEN THOUGH HE DID SO FRAUDULENTLY—LARCENY BY A TRICK OR OBTAINING BY FALSE PRETENCES.

London Jewellers, Ltd. v. Attenborough. [1934] 2 K. B. 206.

By representing that he could sell their goods to actresses, X induced the plaintiffs to hand jewellery to him. With each article was a note, showing the value and with the words ‘On Appro’, which X signed to show receipt. X never sold or accounted for any of the articles; but as soon as he got one he handed it over to one or other of several women, who pawned it in her own name with the defendants. On learning of this the plaintiffs informed the police; and X, who pleaded guilty to larceny as a bailee, was sentenced to a term of imprisonment.

The plaintiffs then sued the defendants for the return of the articles or their value, or alternatively for damages for conversion.

It was admitted that the defendants acted in good faith and believed that they were dealing solely with the women. X stated in evidence that he had no intention of buying the articles himself or of showing them to any customer, although if he could have found a buyer he would have sold rather than pawned. His intention was to get a woman to pawn each article, and to retain the proceeds for himself.

The main grounds of defence were: (1) No action of detinue lay, as there had been no demand and refusal to deliver the goods before the action was brought. (2) Property in the goods had passed to the defendants under (a) Sale of Goods Act, 1893, s. 18, r. 4, or s. 25 (2); or (b) Factors Act, 1889, s. 2 (1).

Swift J., giving judgment for the plaintiffs, rejected these arguments. (1) While in his opinion no such demand was necessary, he was satisfied on the facts that there had been a sufficient demand. (2) (a) Neither section of the Sale of Goods Act applied, since he found as a fact that X was not a buyer. (2) (b) He did not think that X was a mercantile agent. But if X were a mercantile agent he was bound by *Folkes v. King* [1923] 1 K. B. 282 to hold that X was in possession of the goods with the owner’s consent within the Factors Act, s. 2 (1). The point failed, however, as X did not pledge the goods in the ordinary course of business as a mercantile agent.

The Court of Appeal unanimously reversed the decision of Swift J.

Scrutton L.J. said that the matter was determined by the decisions of *Kirkham v. Attenborough* [1897] 1 Q. B. 201 and *Folkes v. King* (*supra*). *Kirkham v. Attenborough* decided that when a person who has received goods on sale or return pledges them, he does an act adopting the transaction within Sale of Goods Act, s. 18, r. 4, so that the property passes to him. Therefore X made himself a buyer when he pledged the goods. X was not a buyer when he originally received the goods; for at the time the plaintiffs were not selling to him but giving him a right to sell. But when he exercised this right he became a buyer.

Swift J. had rejected the defence of the Factors Act (which was not raised on appeal) as he had felt embarrassed by the relation of *Folkes v. King* to other cases. But the Court of Appeal felt no difficulty in following *Folkes v. King*, on the ground that if an ‘agent’ obtains goods

by making false representations as to what he is going to do with them, that is a case of obtaining by false pretences, and the agent has a good title, until the contract or the possession is avoided; having possession and the right of disposal, he can pass the property by sale or pledge.

Greer L.J. sympathised with the proposition that, as from the very commencement X intended to steal the jewellery, he could not acquire or pass any property in it. But *Folkes v. King* bound him to hold that there was here an obtaining by false pretences. A man who obtains possession with authority to sell, and then sells, cannot be treated as having obtained the goods by larceny by a trick.

The chief point in this case was whether X was in the possession of the goods with the consent of the owner. Similar facts have in the past caused a conflict of opinion. According to *Oppenheimer v. Frazer* [1907] 2 K. B. 50 the plaintiffs' apparent consent would be nullified by X's misrepresentation of his intention. The contrary opinion in *Whitehorn v. Davison* [1911] 1 K. B. 463 was, however, adopted by the Court of Appeal in *Folkes v. King*—a decision binding in the present case. As, then, there was a true consent, X held under a contract, which gave him a voidable title. Until this was avoided, he could pass the property to innocent third parties.

W. M. P.

SALE OF GOODS—SHIP'S PROPELLERS TO BE TO 'THE ENTIRE SATISFACTION' OF PURCHASERS AND A THIRD PARTY—IMPLIED CONDITION UNDER SALE OF GOODS ACT, 1893, s. 14.

Cammell, Laird & Co. Ltd. v. Manganese Bronze and Brass Co. Ltd.
[1934] A. C. 402.

THE appellants, shipbuilders, ordered from the respondents two propellers for two sister-ships known in their yards as 972 and 973. They supplied working drawings which gave the information necessary for the work to be carried out, including the thickness required along the medial lines of the blades; further details as to the thickness of the blades were left to the skill and judgment of the respondents. The propellers were to be to 'the entire satisfaction' of the appellants and of the representative of the owners for whom the ships were being built. Of the two propellers supplied by the respondents the propeller for 973 proved satisfactory when fitted to either vessel, but the propeller for 972 caused excessive vibration. Two other propellers had to be made and long trials undertaken before 972 was satisfactorily fitted. The shipbuilders claimed damages for the delay and the expenses incurred in consequence. Their grounds of claim were:—

(1) that there had been a breach of the express warranty that the propellers should be to 'the entire satisfaction' of themselves and the owners' representative, and

(2) that there had been a breach of an implied condition under the Sale of Goods Act, 1893, s. 14 (1), that the propellers should be fit for the particular purpose for which they were required. The respondents counterclaimed for the cost of the two replace propellers. Roche J. gave judgment for the shipbuilders, but his judgment was reversed by the Court of Appeal. (Scrutton and Lawrence L.J.J.; Greer L.J. dissenting).

The shipbuilders appealed to the House of Lords, who reversed the decision of the Court of Appeal.

In considering the express warranty the House of Lords took the view that there had been 'a plain breach of a specific stipulation of the contract' (Lord Macmillan, at p. 417). Although the two discarded propellers were in accordance with the plans of the shipbuilders and of good workmanship and materials, yet the shipbuilders had bought them as propellers to work a ship and as such there was no question but that they were unsatisfactory. Three of the noble and learned lords thought that the appellants were entitled to succeed on this ground alone, although they agreed with their brethren that the case came within the Sale of Goods Act.

To satisfy section 14 (1) of that Act, the appellants had to make known to the respondents the particular purpose for which the goods were required, so as to show that they relied on their skill and judgment. They had satisfied the former requirement in that the respondents had known all along that the propellers were for 972 and 973. The actual fact of reliance will be inferred from the communication by the purchaser of the particular purpose for which the goods in question were purchased and need not be proved by positive evidence: *Manchester Liners, Ltd. v. Rea, Ltd.* [1922] 2 A. C. 74. But was this reliance altered through the appellants having supplied specifications? Were the respondents merely working to a plan and to nothing else?—No, for the appellants had left certain details to the skill and judgment of the respondents, as was shown by the fact that even the two unsatisfactory propellers conformed to their specifications. These specifications were necessary for the work to be carried out, but it was the respondents' duty to attend to all the other details necessary to produce satisfactory propellers. Further, even partial reliance by the buyer on the skill and judgment of the seller may be enough to bring a case within the sub-section. There had therefore been a condition implied under sub-section 1 that the propellers should be fit for their purpose and there had been a breach of this condition.

Lord Wright said in this case (at p. 426), 'Every case in which the issue is whether the terms of section 14 (1) have been fulfilled must present its own questions of fact and degree.' That these questions can be peculiarly difficult is shown by this case. Where the experts themselves could not find out why the offending propellers did not work properly there cannot have been a great failure of skill and judgment by the respondents. But some one had to pay for the replace propellers and the burden finally rested on their shoulders because it was their job to make propellers that would drive a ship. This they had failed to do.

G. R. S.

TORT—BREACH OF A STATUTORY DUTY—HOW FAR STATUTORY REMEDY EXCLUDES ACTION IN TORT—ROAD TRAFFIC ACT, 1930—MOTOR CAR INSURANCE.

Monk v. Warbey. [1935] 1 K. B. 75.

THE defendant Warbey lent his car to K. on whose behalf it was driven by M. with Warbey's knowledge and acquiescence. The plaintiff suffered injuries as a result of a collision between the car and a motor

coach, due, it was alleged, to M.'s negligence, and claimed damages from Warbey on the ground that he had committed a breach of the Road Traffic Act, 1930, s. 35. That section states that 'Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on the road unless there is in force in relation to the user of the vehicle . . . such a policy of insurance . . . in respect of third-party risks as complies with . . . this Act.' It further provides for heavy penalties in the event of a breach. Neither K. nor M. was so insured and they were both liable under the Act; but as they were impecunious the action was brought directly against Warbey.

Three defences were pleaded by the defendant on appeal from a decision of Charles J., all which the Court of Appeal unanimously refused to accept: (1) That no civil remedy was available for a breach of section 35 of the Road Traffic Act, 1930. Greer L.J. pointed out (at p. 80) that the Act 'was passed for the very purpose of making provision for third parties who suffered injury by the negligent driving of motor vehicles by uninsured persons to whom the insured owner had lent such vehicles.' The existence of heavy penalties did not exclude a civil remedy, for though prosecution and fines may be a reason for not committing a breach, it is no protection for the injured party. *Groves v. Lord Wimborne* [1898] 2 Q. B. 402 laid it down that even where part of the statutory penalty is recoverable by the injured party damages could still be obtained. Referring to this case, Greer L.J. said (p. 81), '*prima facie* a person who has been injured by the breach of a statute has a right to recover damages from the person committing it unless it can be established by considering the whole of the Act that no such right was intended to be given.' There is nothing in the Road Traffic Act, 1930, which tends to exclude a civil remedy and the argument therefore failed. Maugham L.J. was more hesitant in following this view, but he accepted it; like Roche L.J. he was influenced by sub-s. 4 of s. 35, which provides that no policy of insurance is necessary for anyone who has deposited £15,000 with the Supreme Court, and thus a civil remedy was brought within the intention of the Legislature. (2) That the damage was too remote. On the assumption that damages were recoverable for the breach of this statutory duty, the damage flowed directly from that breach. The Act seeks to protect anyone injured by an impecunious and uninsured person, which was precisely the case here. (3) That the action against Warbey was premature. But it was held that, as the cause of action arose primarily from the breach of a statutory duty, and as the person directly responsible was in no financial position to pay and bankruptcy proceedings would have been of no advantage to the plaintiff, this was no defence. Greer L.J. even stated (at p. 83) that the plaintiff might have brought his action without joining K. and M.

This decision, besides serving as a warning to those who indiscriminately lend their cars, clarifies the law as to remedies on the breach of a statutory duty. It has long been well known that every statute should be construed on its own merits. *Gorris v. Scott* (1874) L. R. 9 Ex. 125 shows that damage from every and any breach of a statutory duty is not actionable; *Atkinson v. Newcastle Waterworks Co.* (1877) 2 Ex. D. 441 lays down the principle that a remedy cannot be obtained for damage of a sort never contemplated by the statute. The case before us differs from *Phillips v. Britannia Hygienic Laundry Co.* [1923] 2 K. B.

832 in the construction of the statute in question. In the latter case the Court decided that there was only a public duty, whereas in this case there was one towards the injured party as well.

M. I. M.

TORT—DANGEROUS OPERATION—EMPLOYER OF INDEPENDENT CONTRACTORS IS LIABLE FOR NEGLIGENCE OF LATTER.

Honeywill & Stein, Ltd. v. Larkin Brothers. [1934] 1 K. B. 191.

APPEAL from the King's Bench Division. The plaintiffs, who were specialists in acoustic work, had installed a sound-reproduction apparatus at a cinema, owned by X, from whom the plaintiffs obtained permission to have photographs taken of the interior for their own business purposes. They employed the defendants to take the photographs. The defendants in taking a flashlight photograph (a dangerous process if near inflammable material) conducted the operation so negligently that they set fire to the cinema, and damage was done to the extent of £261 4s. 3d.

X threatened the plaintiffs with an action to recover that amount, which the plaintiffs acting under advice paid. The plaintiffs brought an action to recover the same amount from the defendants. The defendants denied that the plaintiffs had ever been under any liability to the cinema company; for they contended that the negligence, if any, of their photographer was that of an independent contractor, for which the plaintiffs were not responsible, and that the payment made to the cinema company was therefore a voluntary payment. Bennett J. held that the work to be done by the defendants was not necessarily attended with risk, and dismissed the action.

The Court of Appeal reversed this decision. Its judgment was delivered by Slesser L.J. who pointed out, that though an employer was not in general liable for the acts of an independent contractor, even if those acts were done in carrying out the work for his benefit under the contract, nevertheless there were exceptions; and that the tendency has been to enlarge the scope of these exceptions. He said: 'The incidence of this liability is limited to certain defined classes; and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others; of such acts the causing of fire and explosion are obvious and established instances' (p. 197).

The Court held the operation to be a dangerous one which cast upon the plaintiffs an obligation to use reasonable precautions to see that no damage resulted to the cinema company from the dangerous operations; and that therefore they could not delegate that obligation by employing the respondents, the defendants in the action, as independent contractors.

Black v. Christchurch Finance Co. [1894] A. C. 48 was in point. In that case the defendant company was held liable for the act of its independent contractor for negligently and improperly lighting a fire on its land, and allowing it to spread to the plaintiff's lands. *Hughes v. Percival* (1883) 8 App. Cas. 443 and *Holliday v. National Telephone Co.* [1899] 2 Q. B. 392 were also cited. In the latter case the defendant company were held liable for the injury done to a passer-by on the high-

way, through the negligence of a plumber engaged as an independent contractor.

The case of *Brooke v. Bool* [1928] 2 K. B. 578 was approved and applied. In that case the defendant entered the plaintiff's shop with another man, Morris, in order to ascertain whether there was an escape of gas. Morris investigated it with a naked light and an explosion occurred. The defendant was held liable. Talbot J. in his judgment said (at p. 587): 'The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him.'

J. H. L. R.

TORT — DANGEROUS PREMISES — INJURY TO CHILD FROM SWING ON RECREATION GROUND PROVIDED BY LOCAL AUTHORITY.

Purkis v. Walthamstow Borough Council. (1934) 151 L. T. 30.

THE facts of the case were simple. The Council had set aside a portion of the park for children under twelve, with one attendant in charge. The plaintiff, who was just over twelve, fell from a swing there owing to sickness induced by his own fault, and being giddy, was hit twice by the swing before he could get away. There were some 200 children in the playground at the time.

He sued, alleging negligence on the part of the local authority in not providing sufficient supervision, though there was no suggestion that either the attendant who was provided was negligent, or that the apparatus was defective. In the Court of first instance Macnaghten J. left the question of the extent of the duty of care, as well as that of whether it had been broken, to the jury; and they answered both questions against the defendants. On appeal, however, the defendants succeeded, the Court of Appeal holding, first, that the extent of the duty was one of law for the judge, and not of fact for the jury, and secondly that, whatever the duty was, it could not possibly extend to providing attendants to see whether each child was physically fit to go on a swing; as Scrutton L.J. put it: 'No amount of reasonable supervision will stop some children from being sick on a swing or a roundabout' (at p. 32).

The importance of the case seems to lie less in the *ratio decidendi* than in the *obiter dicta*. All three judges discussed what was the position, and how far the duty went. Scrutton L.J. seemed to think that children in parks, since the corporation has not a duty, but only a power, to provide them, are in the position of licensees. There was, therefore, no liability, except for traps of which they knew, and the child did not, and could not, know. Thus, where in *Hastie v. Edinburgh Magistrates* (1907) S. C. 1102 a child of four-and-a-half years fell into an unfenced lake, the magistrates were rightly held not liable, whilst in *Glasgow Corporation v. Taylor* [1922] 1 A. C. 44, where a child had eaten poisonous but harmless-looking berries, it had been rightly held that there was a trap and the corporation were liable. Equally, whilst the corporation would be liable for providing defective apparatus, since that

would be a trap, it could be under no duty to supervise the use of proper apparatus, for that would be to place upon them a responsibility much wider than that for traps only. Therefore he considered that *Gow v. Glasgow Education Authority* (1922) S. C. 260, where it was held there was no duty to supervise blind children in their games so as to prevent them hurting one another, laid down the correct principle.

Greer L.J.'s judgment differs from Scrutton L.J.'s only in that he was more positive that the boy was a bare licensee. Maugham L.J., however, took a different and more interesting line. Whilst holding that, since the purpose of the corporation's providing parks at all, the duty owed to the public 'may be as great as that which he owes to an invitee or even greater,' that the public had a sort of qualified right to be there, he held that a strict limit must be placed to the duty on grounds of what appear to be public policy. To insist on a wide definition of the duty would be to make the duty so onerous that the playgrounds would cease to be provided at all, because the expense of providing an adequate number of attendants would be so disproportionate to the benefit derived. The world must be accepted as it is found, and some responsibility must be placed on the users. If they will go on swinging when they are sick, though they may have every right to do so, they must take the consequences when they fall off.

The case is interesting as suggesting a division of judicial opinion on the basis of liability which may become important. Scrutton L.J.'s view would seem to be the best warranted by authority, but there is some support, particularly the speech of Lord Dunedin in *Hastie's Case* (*supra*), for the view of Maugham, L.J.

M. Z.

TORT—DEFAMATION—LIBEL—POSTER DISPLAYED AT NEWSAGENT'S BOOK-STALL—LIABILITY OF NEWSAGENT—QUESTIONS FOR JURY.

Sun Life Assurance Co. of Canada v. W. H. Smith & Son, Ltd.
(1934) 150 L. T. 211.

THE defendants displayed on a number of their station bookstalls a poster advertising a publication known as 'The City Mid-Week,' on which was printed in large lettering 'More Grave Sun Life of Canada Disclosures.'

Plaintiffs had already been awarded £19,000 damages against the publishers of the poster and newspaper, it being held that the words were capable of libellous meaning, as signifying rather that the grave disclosures were made *about* the company and not made *by* the company. But the action against W. H. Smith & Son, at one time consolidated with that against the publishers, had been severed and was tried before the Lord Chief Justice with a special jury.

It appeared that the posters were sent out in parcels by the proprietors of the paper to Messrs. W. H. Smith & Son, who were under contract to exhibit them at twenty-four railway bookstalls. The defendants pleaded that there was no opportunity of examining the parcels at the head office, and that no discretion was given to the managers of bookstalls to withhold exhibition.

Mallon v. W. H. Smith & Son (1893) 9 T. L. R. 621 was cited for

the defence—a case in which the jury found for the defendants although a bookstall manager had continued to sell a paper after being informed that it contained a libel.

The Lord Chief Justice put the following questions to the jury in the present case, based on the questions put in *Emmens v. Pottle* (1885) 16 Q. B. D. 354: (1) Was the poster by itself libellous?—Yes. (2) Were the defendants innocent of any knowledge of the libel contained in (a) the newspaper, (b) the poster?—Yes. (3) Was there anything in the circumstances in which the newspaper or the poster . . . came to the defendants, or were disseminated by them, which ought to have led them to suppose that they or either of them, contained a libel?—No. (4) Was there any negligence on the part of the defendants in not knowing that the poster or newspaper contained a libel?—Yes. The jury assessed the damages at £3,000, and judgment was entered for that amount. Defendants appealed.

The Court of Appeal in dismissing the appeal held that there was ample evidence of negligence on the part of the defendants, and that question (4) was rightly answered and was enough to support the judgment. Scrutton L.J. said (at p. 214), 'If the defendants are compelled at their head office to send out papers and posters without knowing what is in them because of the mass and volume of their business, and . . . direct the managers of their bookstalls who . . . would in the course of business look at the posters before they are posted, not to exercise any discretion . . . the jury may very well find that they are carrying on their business carelessly in that respect,' and he added (at p. 216) that *Mallon v. W. H. Smith & Son* ' . . . is no authority for the proposition that when you are told that a publication contains a libel you may go on selling it and escape liability.'

The learned Lord Justice criticised (at p. 212) the form of the questions put by the Lord Chief Justice. He thought that it would probably be better if the questions for the jury in cases like that of *Emmens v. Pottle*, once the libel has been established, were simplified by substituting for questions (2), (3) and (4) above the simpler questions: (i) did the defendant know that the document contained a libel; if not, (ii) ought he to have known that it contained a libel, i.e., was there negligence on his part in carrying on his business in respect of publication of the libel?

As Scrutton L.J. pointed out, it is difficult to see any valuable distinction between questions (3) and (4).

F. W. E.

TORT—DEFAMATION—TALKING FILM HELD TO BE LIBEL NOT SLANDER—
ALLEGATION THAT A WOMAN HAS BEEN RAVISHED HELD TO BE
DEFAMATORY—DAMAGES.

Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.
(1934) 50 T. L. R. 581.

At the trial before Avory J. and a special jury Princess Youssoupoff was awarded £25,000 damages against defendants in respect of a libel contained in a talking film entitled 'Rasputin, the Mad Monk.' The plaintiff alleged that she had been commonly identified with the Princess

Natasha in the film. It was defamatory in that she was represented as having had illicit relations with a man of the worst possible character. The defendants now appealed, first, on the point of identification; secondly, because, in any case, there was no evidence of defamation since, if illicit relations were indicated at all, they constituted rape not seduction. Accordingly the spoken word of the film was, if anything, a slander not actionable without proof of special damage. Thirdly, the damages were excessive. The Court of Appeal, consisting of Scrutton, Greer, and Slesser L.JJ., unanimously dismissed the appeal.

Scrutton L.J., dealing with the first ground of appeal, attached much importance to the decisions in *Hulton & Co. Ltd. v. Jones* [1910] A. C. 20, and *Cassidy v. Daily Mirror Newspapers, Ltd.* [1929] 2 K. B. 331. The principle established in those cases was that 'In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff.' Evidence of that nature had been before the jury in the present case and it was for them to decide whether 'reasonable people, not all reasonable people, but many reasonable people' (p. 583) did identify the respondent with Princess Natasha. Greer L.J. reached the same conclusion by a different line of argument, as was to be expected after his powerful dissent in *Cassidy's Case*. He thought both cases cited by Scrutton L.J. immaterial. Although the defendants had not used the actual name of the plaintiff, they had "used a description of her that could apply to no one but the plaintiff."

Turning to the second ground of appeal Scrutton L.J. cited the principle of Fox's Libel Act, 1792, that 'libel or no libel' is a matter for the jury: *Broome v. Agar* (1928) 44 T. L. R. 399. The only exception to it is where the judges withdraw a case from the jury because the statements complained of are incapable of a defamatory meaning: *Capital and Counties Bank v. Henty* (1882) 7 App. Cas. 741. That exception could not apply here, and the jury must be taken to have decided rightly. Whether a defamatory talking film constituted libel or slander was dealt with more specifically by Slesser L.J. He thought it was undoubtedly a libel being a 'permanent matter to be seen by the eye' the speech with which the picture is synchronized being merely an ancillary circumstance (p. 587). He was further of opinion that an imputation of rape might not tend to bring the plaintiff into hatred, contempt or ridicule, but it would tend to cause her to be shunned and avoided, and that was sufficient to make it defamatory.

As to the allegation that the damages were excessive, Scrutton L.J. said the amount of damages was a matter for the jury. The deciding factor was not what the judges might think reasonable but what in the opinion of the jury was reasonable. The Court of Appeal would interfere only when 'the amount of damages was such that in all the circumstances no twelve reasonable men could have given it' (p. 585). Here there was no such ground for interference. Greer and Slesser L.JJ. came to the same conclusion, though the former did so only after some hesitation. Whether an imputation of rape comes within the meaning of section 1 of the Slander of Women Act, 1891, is, as yet, undecided, though it was raised in this case. Scrutton L.J. clearly thought that it did. The other Lords Justices did not discuss the point, as the case was one of libel, not slander.

TORT—INVOLUNTARY BAILEE—HOW FAR LIABLE FOR NEGLIGENCE OR FOR CONVERSION.

Elvin & Powell, Ltd. v. Plummer Roddis, Ltd. (1934) 50 T. L. R. 158.

THIS was an action by the plaintiffs, manufacturers of mantles, against the defendants, retailers, for (i) wrongful conversion of coats and for (ii) negligence while acting as bailees.

X came into the plaintiffs' warehouse, representing that he was a buyer, and ordered a quantity of coats. He said they were to be sent to a branch shop of the defendants at Brighton. The coats were sent. Later X sent a telegram to defendants, saying 'Goods dispatched to your branch in error. Sending a van to collect.—Elvin & Powell.' Subsequently a man, claiming to be employed by Elvin & Powell, arrived at the branch and handed in a trade card of Elvin & Powell. The coats were delivered to him.

It was claimed for the plaintiffs that the defendants became bailees of the goods and that it was their duty to take reasonable care, that they had not done so and were guilty of negligence; alternatively, that the defendants had wrongfully converted the goods, not taking reasonable care in parting with them as they did.

Hawke J. held that involuntary bailees, not guilty of negligence, were not liable to pay damages if something they did resulted in the loss of property. Therefore the defendants were not liable, the jury having found them innocent of negligence. Further, he held that the admission of the counsel for the plaintiffs that there was no evidence of intention on the part of the defendants to deny the plaintiffs' right to the goods or to assert a right inconsistent with that right, negatived conversion. Judgment was given for the defendants.

According to the report no authority was cited, but the decision seems to be consistent with the following earlier authorities: *Lethbridge v. Phillips* (1819) 2 Stark. 544; *Howard v. Harris* (1884) 1 Cab. & E. 253; *Batistoni v. Dance* S. J. Jan. 25, 1908; Bramwell B. in *Hiort v. Bott* (1874) L. R. 9 Ex. 86, 90.

G. B. A.

TORT—NEGLIGENCE—DAMAGES—PERSONAL INJURIES WHICH SHORTENED REASONABLE EXPECTATION OF LIFE HELD NOT TO BE TOO REMOTE.

Flint v. Lovell. [1935] 1 K. B. 354.

THE plaintiff suffered severe personal injuries as the result of the negligence of the defendant in driving her motor car so that it collided with his car. He was a man of 69, in good health for his age, and might reasonably have been expected to live for some years, but, as the result of his injuries, his expectation of life was probably something under a year. Acton J., sitting without a jury, awarded £4,400 damages. There was no dispute as to the liability of the defendant to pay damages, but she appealed for a reduction in the amount of damages.

A majority of the Court of Appeal (Greer and Slesser L.J.J.) held that the fact that the reasonable expectation of life of the plaintiff was very materially shortened was rightly taken into consideration in estimating the amount of damages and that the damages were not excessive.

For the defendant it was argued that so to hold would be in effect to award the plaintiff damages in respect of death and that *Admiralty Commissioners v. S.S. Amerika* [1917] A. C. 38 settled conclusively the rule that any person who suffers damage by reason of the death of another, caused by the wrongful act of a third party, cannot bring an action for damages for the death. But the Court held that so much of the damages here as were attributable to the shortening of the plaintiff's life were not given in respect of his death, but in respect of the destruction of the prospect of future amenities of life which he might otherwise have enjoyed. The only real reason ever given for the rule (which was embodied in *Baker v. Bolton* (1808) 1 Camp. 493) was that the death was probably caused by a felony and that any civil action in respect of it was 'merged in the felony.' Slessor L.J. reviewed the history of the rule and came to the conclusion that on the principle of *Baker v. Bolton* it was impossible to say that the tort, in so far as it shortened the plaintiff's life, could in any circumstances merge in the felony, for the defendant did not kill the plaintiff and had committed no felony at all. Therefore there was no reason why the shortening of the plaintiff's life should not be taken into account in the assessment of damages.

As to the justification for reversing the trial judge on the question of damages Greer L.J. said that it would be necessary for the Court to be convinced either that the judge acted on some wrong principle of law or that the amount awarded was so extremely high or small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damages.

Roche L.J. (dissenting) thought the amount of damages excessive in any event. The shortening of life was correctly deemed to be material in assessing damages, but Acton J. had also allowed this under a separate head (£400) and this was open to the objection that it was difficult to avoid giving compensation for the same thing more than once under various heads of damage; for evidence of the shortening of life had a bearing on the amount of damages awarded, in that (1) it was evidence of the seriousness of the injuries unrepaired by medical treatment; (2) the weakness preceding impending death produced or increased the pain, which was an element to be considered in assessing damages.

He also expressed doubts (without, however, actually dissenting) as to the correctness of the conclusion that *Baker v. Bolton* did not apply. He pointed out that (1) it was most illogical that death should not give a right of action, but shortening of life should; (2) the admission of that head of damage was novel and difficult of application, for if the plaintiff here merited the sum awarded, by what compensation was the shortening of life of a young man to be met?

J. M. H.

TORT—NEGLIGENCE—NUISANCE—ALLUREMENT TO CHILD BY HEAP OF SOIL ON HIGHWAY—TRESPASSING CHILD HAS NO REMEDY FOR INJURY SUSTAINED.

Liddle v. Yorkshire (North Riding) County Council. [1934] 2 K. B. 101.

IN improving a road, defendant Council's workmen place on the new verge a heap of soil which formed a slope giving easy access to the top

of a new retaining wall built by defendants. Children played about the works but workmen always warned them off. After the workmen had left, the plaintiff, a child, ascended the slope to the top of the wall on which he sat. He overbalanced and fell, sustaining injuries for which he sued: (i) for negligence; (ii) for nuisance.

The Court of Appeal, in giving judgment for the defendants, held that in mounting the heap plaintiff was a trespasser to whom the defendants owed no duty, not having placed the heap where it was with the intention of causing him an injury; therefore the defendants were not liable for negligence. Held, further, that the heap being on undedicated land the defendants had committed no nuisance.

The Court were of opinion that *Cooke v. Midland G. W. Ry. of Ireland* [1909] A. C. 229 must be treated as dealing with a child impliedly licensed to use the turn-table, which constituted a trap for a child.

Scrutton L.J. criticized the idea that the best way to get a boy to do something was to tell him not to do it, and he denied that prohibition could be a disadvantage to the prohibiter. He approved the pronouncement of Holmes J. in *Van Britt's Case* (1922) 258 U. S. 268 that children had no greater right to go upon other people's land than adults, and that the mere fact that they were children imposed no duty upon landowners to expect them, and to prepare for their safety. His own judgment in *Hardy's Case* [1920] 3 K. B. 459, adopted by Lord Hailsham in *Addie v. Dumbreck* [1929] A. C. 358, was that, apart from intentional injury or putting dangerous traps with intent to injure them, a landowner was not liable if trespassers injured themselves on objects legitimately upon his land in the course of his business. The child's acts were trespasses. On the questions of allurement and trap which the trial judge left to the jury, 'it must be a matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal' (citing Hamilton L.J. in *Latham v. Johnson* [1913] 1 K. B. 398, 416). There was no nuisance for the verge was not yet dedicated, nor had the heap caused the accident; *Barker v. Herbert* [1911] 2 K. B. 633.

The case established no novel principles: the Court applied the same rules as it had laid down in *Hardy's Case* and *Latham v. Johnson* (*ante*). It is settled, therefore, that once the question 'Was he a trespasser?' is answered affirmatively, the plaintiff must fail, unless there has been positive wrongdoing, deliberate or reckless, in disregard of the child's presence. A child licensee succeeds only if he is injured by some concealed danger known to the owner or by some object both 'fatal and fascinating': all objects are potentially instruments of harm and the owner is not to be made an insurer even of child licensees. Thus in all these cases the test of reasonable foresight of the likelihood of children resorting to a defendant's land, which, it seems, was maintained by Lord Macnaghten in *Cooke's Case* (*supra*) and by the trial judge in the present case, is inoperative; and Greer L.J. rejected the test as an *obiter dictum* (p. 119). A reasonable owner would possibly contemplate that children may trespass and be hurt by machinery; or that resolute child licensees may harm themselves with pebbles lying on the land: in neither case would his inertia make him liable. The decision in the present case would have been the same had the object been a concrete-mixer or (it is submitted) an unfenced sausage-machine. That the different treatment accorded to child licensees and to child trespassers is dictated by considerations of substantial justice and the desire to have a convenient working rule in a

difficult class of cases is apparent from the fact that the child licensee may recover though he may become, in the ultimate stage of the transaction, a trespasser. It should be noticed that the formulation, by Scrutton L.J., of the rules of liability to child licensees is marred by failure to observe the technical meaning of the word 'invitation.'

F. W. T.

TORT—NEGLIGENCE—POLICE CONSTABLE INJURED IN STOPPING RUNAWAY HORSES IN CROWDED STREET—DOCTRINES OF NOVUS ACTUS INTERVENIENS AND VOLENTI NON FIT INIURIA HELD NOT TO BE APPLICABLE IN THE CIRCUMSTANCES.

Haynes v. Harwood. [1935] 1 K. B. 146.

THE defendants were owners of a two-horse van, which their employee left unattended for a few minutes in Paradise Street, Rotherhithe. That street about 4.30 p.m. was always crowded with children coming out of school. The horses were bolting down a slight incline when the plaintiff, a police constable who was on duty inside a police station in Paradise Street, rushed out, pushed aside a woman who was in actual peril, and stopped them. In doing so, he sustained the injuries for which he claimed damages.

The defendants denied negligence, and raised the defences of (a) *volenti non fit iniuria*, and (b) contributory negligence.

Finlay J. held ([1934] 2 K. B. 240) that in the circumstances there was a presumption of negligence, which the defendants had failed to rebut, and that as the plaintiff, though not on duty in the street, owed a general duty to the public to protect life and property, the doctrine of *volenti non fit iniuria* did not apply and therefore the plaintiff was entitled to recover.

The Court of Appeal affirmed this judgment. The judgment of Greer L.J. is of particular interest.

After detailing the facts of the case he said (at pp. 151–152), 'It is said . . . that the plaintiff is in law without remedy . . . and in support of this contention certain reasons are given. Before dealing with those, however, I may say that it would be a little surprising if a rational system of law in those circumstances denied any remedy to a brave man who had received his injuries through the original default of the defendants' servant.'

He then considered the two points of *novus actus interveniens* and *volenti non fit iniuria*. If what was relied on as a *novus actus interveniens* was the kind of thing which would be likely to happen owing to the breach of duty of the defendants—if 'it was the natural and probable consequence of the wrongful act' (p. 153)—remoteness of consequence was no defence here.

As to *volenti non fit iniuria*, Greer L.J. adopted Professor A. L. Goodhart's summary of the American authorities in 5 *Cambridge Law Journal* (p. 196). 'The doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protec-

tion, as a member of his family, or is a mere stranger to whom he owes no such special duty.'

A parallel case was that of *Brandon v. Osborne, Garrett & Co. Ltd.* [1924] 1 K. B. 548. There, while the plaintiffs, a husband and wife, were in a shop, the glass roof fell on the husband; the wife tried to pull him away and was injured. Swift J. held that she was entitled to recover notwithstanding that her injury was caused by her own voluntary act, and that she was not guilty of contributory negligence, for she had acted reasonably. In the case before us Maugham L.J. declined to adopt the view expressed in *Salmond on Torts* (7th ed. p. 38; 8th ed. p. 472) that the plaintiff must not have had time to think, and that if his action were deliberate, even though rapid, it would be a *novus actus interveniens*.

As the learned Lord Justice said, nothing fell from Swift J. in *Brandon's Case* in support of this.

Greer L.J. distinguished the present case from *Cutler v. United Dairies (London) Ltd.* [1933] 2 K. B. 297. A run-away horse had come to rest in a field close by the plaintiff's house. The plaintiff, in response to an unnecessary cry of help, jumped over the hedge and tried to hold the horse and was injured in so doing. The plaintiff's act was here *novus actus interveniens*,—nobody was in danger,—the plaintiff, in fact, was a volunteer and could not recover.

In *Cutler's Case* Scrutton L.J. said *obiter* (at p. 303), 'I start with this: A horse bolts along a highway and a spectator runs out to stop it and is injured. . . . A man is under no duty to run out and stop another person's horse and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse.' But Greer L.J. pointed out that Scrutton L.J. had not in contemplation at the time the circumstance of some one running out for the purpose of rescuing or protecting people in danger. *Cutler's Case* was, in brief, not a rescue case. That is the point of difference.

It should be noted that Greer L.J. went further than Finlay J. His decision seems to suggest that a policeman—or that anyone, and still more a policeman,—has a general duty to the public to preserve life and property.

A converse question is, 'Can an injured person bring an action for a breach of that duty if a policeman fails to attempt a rescue?' Not necessarily. The duty would be broken only if the policeman acted unreasonably; and the law, while it would expect him to show the amount of courage to be expected from an average policeman, would not hold him responsible for not doing a very brave act.

R. F. H.

TORT—NUISANCE ARISING FROM NON-REPAIR—KNOWLEDGE OF OWNER—
PREMISES ADJOINING HIGHWAY—NO CONTRACTUAL LIABILITY TO
REPAIR ON OWNER OR OCCUPIER—JOINT LIABILITY OF LANDLORD AND
TENANT.

Wilchick v. Marks and Silverstone. [1934] 2 K. B. 56.

The plaintiff in this case while walking along a highway suffered personal injury by the fall of a defective shutter from premises adjoining

the highway. The premises were owned by A. S. and J. S., by whom they had been let, since 1914, to M. on a weekly tenancy. The plaintiff brought an action against both occupier and owners, or, alternatively, one or the other, alleging a duty on the owners to repair, and alleging an express contract by the owners with the tenant to that effect. This contention was supported by the third-party proceedings of the tenant, claiming indemnity from the owners if he was held liable.

Who was liable? The terms of the letting, as often happens in tenancies of this kind, except in so far as they were contained in the rent book, were oral. In the rent book, the landlords had reserved the right to enter and do what repairs they thought necessary. In fact, for the last twenty years they had done the repairs, and further they knew the shutter was out of repair, but this did not raise an estoppel against the owners from denying that they were not liable, as against the tenant, to do the repairs. There was, in the rent book, merely a reservation of the right of entry by the landlords to do what repairs they might think necessary, so Goddard J. held that contractually neither landlords nor tenant were bound, as against the other, to do any repairs.

Next, it was necessary to consider whether, by raising the rent to its statutory maximum, the owners had raised an estoppel denying that they had agreed to do the repairs. The original rent had been increased as permitted by the Rent Restriction Acts to the maximum, on the basis that the landlords were responsible for the whole of the repairs. But this contention was negated by the *dicta* of the majority of the Court of Appeal in *Morgan v. Liverpool Corporation* [1927] 2 K. B. 131, 148, which the learned judge here followed and applied. Thus it was held that the Rent Restriction Acts did not alter or enlarge the contract between the landlords and the tenant, and the raising of the rent by the statutory maximum did not import an agreement to repair not in the original letting. So in the absence of contractual liability or statutory liability the landlords were not bound to do the repair; therefore they were not liable to indemnify the tenant, and consequently the third-party proceedings failed.

But, apart from contract, the landlords were held liable in tort. They had reserved to themselves the right of entry to do repairs. So they were under a duty to make the shutter safe on the principle laid down by Abbott C.J. in *Laugher v. Pointer* (1826) 5 B. & C. 547 at p. 576: 'I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another.' This case was not one of the type of *Cavalier v. Pope* [1906] A. C. 428, where a landlord was held to be under no duty of care towards an invitee of the tenant's, *i.e.* towards a person who had actually come on the premises and who was not merely lawfully using the highway as was the plaintiff here.

Yet the liability of the landlords does not exclude that of the tenant. The learned judge said that the tenant must take steps to see that no injury befell members of the public who passed his house. The tenant was not exempt because the landlords were liable; he also was liable for the injury caused by the fall of the shutter.

R. H. G.

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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

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BOOK REVIEWS.

Natural Law and the Theory of Society, 1500—1800. By OTTO GIERKE. With a Lecture on the Ideas of Natural Law and Humanity, by ERNST TROELTSCH. Translated, with an Introduction, by ERNEST BARKER, Professor of Political Science in the University of Cambridge. 2 vols. Cambridge: University Press. 1934. xci and 423 pp. (30s. net.)

PROFESSOR BARKER has followed the precedent set by Maitland in translating, with an Introduction, a portion of Gierke's 'Genossenschaftsrecht'. The present work, which deals with the political theories of modern times, is chronologically a complement to Maitland's translation, entitled 'Political Theories of the Middle Age' (1900); but, in other respects, it is a separate and independent book, a welcome and valuable addition to the literature of political science. Professor Barker's admirable translation—faithful to the original text, and yet framed in perspicuous English—will serve to spread far and wide in English-speaking lands not only the history of the influence of Natural Law in our modern age, but also Gierke's own legal and political ideas. Included in the work is the translation of a few pages from Gierke's 'Johannes Althusius', in which the great jurist gave his own conception of law and of the relations between Law and the State; and it is also pleasant to find the translation of a lecture by Troeltsch on the ideas of Natural Law and Humanity in world politics. Professor Barker has translated, furthermore, Gierke's valuable notes and bibliographies; and these, together with an Index to the text and notes, occupy that part of the entire work published in the second volume.

Gierke's career and achievement (1841—1921) are well known to all serious students of law and political science; but to others Sobei Mogi's 'Otto von Gierke: His Political Teaching and Jurisprudence' (London, 1932) will be illuminating. A University Professor, Gierke wrote many works, including 'Deutsches Privatrecht' (3 vols., 1895, 1905, 1917), in addition to the famous 'Genossenschaftsrecht' (4 vols., 1868, 1873, 1881, 1913). The foremost Germanist of his time, he was not only an eminent historian of law and political theory, but also an original thinker of the first order within the legal and political realm. In many of his publications, which cover approximately 10,000 pages, he set out in detail a new approach to the study of jurisprudence and of the theory of the State, seeking to free it from the dogmatism which was fettering its development. Gierke's 'powerful intellect', Professor Seckel, of Berlin, remarked in his memorial address, 'devised an internal synthesis of jurisprudence, philosophy, historical and political science . . . ; theology, philosophy and political science were all enriched by the fruits of his juristic production.'

What Professor Barker now presents to us in English dress is a small

portion of the fourth volume of the 'Genossenschaftsrecht' of this great German historian and thinker; and Gierke's own analytical summary of this portion (pp. 3—31) makes clear to the reader the rich field which he had tilled. Generally speaking, Gierke is concerned with two periods: from 1500 to 1650 and from 1650 to 1800. For the first period he deals with the influence of the Natural Law theory of Society and the State and the Natural Law theory of Associations (*die engeren Verbände*); while, for the second period, characterized by the ascendancy of the Natural Law theory of Society, he deals successively with the Natural Law theories of the Group (*Verbandstheorie*), the State, and the Corporation. In considering the Natural Law Theory of Associations and of Corporations he distinguishes groups within, above, and parallel with, the State.

Professor Barker's Introduction, a lucid and orderly exposition, is in the truest sense an *introduction* to the historical and theoretical subject-matter penned by Gierke. After a brief explanation of the texts which he has translated, he deals successively with four subjects:—Law and Political Theory; the Law of Nature; the School of Historical Law; and the Personality of Groups. To an understanding of Gierke's discourse a reading of Professor Barker's pages is essential. They are, however, more than an introduction to Gierke; for they present to us many of the translator's own political ideas. This original thought of the Professor of Political Science at Cambridge, based partly on his long study of Gierke's work, is a contribution of moment to social and political theory.

Dr. Barker devotes special attention to the problem of the legal personality of groups, including the State. He analyzes and considers the principal theories which have been advanced to explain the legal personality of groups, more especially the fiction theory and the theory of the reality of the group-person, the latter of which Gierke developed as his own. Dissatisfied in a greater or lesser degree with all existing theories in explanation of the nature of the group-person, Dr. Barker has propounded a new theory. Fortified by many arguments, he announces and develops the theory that legal personality resides not in the group itself, but in its purpose. The purpose of a group, he declares, 'may have property attached to it, and own that property; it may have duties attached to it, and owe those duties; it may be a party to legal action in order to vindicate its property or to suffer vindication of its duties. In all these ways it [the purpose of a group] acts as a *persona iuris*; and for all these reasons we may call it a *persona iuris*' (see pp. lxxvi-vii). It is this theory of the legal personality of purpose which Dr. Barker seeks to apply to all groups, including the State itself. He appropriates those features of the older theories which seem to him to be of value; but the theory which he elaborates is more than a *mélange* of former doctrines, for it contains elements drawn from his own original thinking.

Dr. Barker's Purpose Theory, startling to the lawyer, will unquestionably meet with hostile criticism on the part of more than one school of legal theorists, who will much prefer the canonists' doctrine of the *persona ficta* or Gierke's theory that the group is a real person which itself can will and itself can act by the men who are its organs. From Greek and Roman times to the present day jurists and philosophical thinkers have operated with the conception of purpose in its legal, social, and political bearings (see, e.g. Ihering's 'Zweck im Recht'); but to all

seeming Dr. Barker is the first of all writers to advance to the point of personifying purpose as a legal entity capable of acquiring and having legal rights and of being subject to legal duties. Without essaying a criticism, it may be remarked merely that from the view-point of jurisprudence Dr. Barker's theory lacks, in its present formulation, a solid foundation in positive law; and hence it is hardly equipped to compete either with the fiction theory or with Gierke's theory, now slowly rising into ascendancy, that groups are not fictitious legal entities, but real persons serving social, economic, religious and political purposes.

One may perhaps venture with deference to suggest that the chief value of Professor Barker's speculations on legal personality lies more in their social, political and philosophical bearings than in their juristic significance as an argument in favour of substituting a Purpose Theory for the older doctrines in regard to the nature of legal persons. By stressing the basic importance of purpose in the life of groups he has done more than any other very recent writer since Gierke's time to clarify our ideas in regard to law as the chief purpose of the State and of the groups within the State; and in other directions, moreover, he has taught us much as to the place held by groups in human society. Helpful, however, as Professor Barker's pages are to an understanding of the truth that legal persons, including the State itself, exist for economic, social, political, and cultural purposes within the framework of law, they are not convincing as an argument in favour of the view that these purposes should themselves be regarded as legal persons.

In several directions Dr. Barker has been much influenced by Gierke's thought; but, in rejecting that great scholar's theory of groups as real persons, he has been led to very different conclusions. Gierke's doctrine as to the relations of law and the State, for example, is essentially a doctrine of their equality. Dr. Barker, fearful lest the State as a real person be omnipotent, holds to the view that the Law is sovereign, thus materially modifying Gierke's neat balance of the State and the Law as two equal forces. To reject the theory of the real personality of groups, Dr. Barker declares, 'is to find the essence of the State in its purpose of law, and to subject it to its purpose. . . . Only if we make the State, like every other group, a common purpose, and not a real group-person, shall we escape the tyranny of mere will. Purpose is something specific; and if we are face to face with a State which is a specific purpose, we are face to face with the finite. In a word, we see and accept the sovereignty of Law' (pp. lxxxvi-vii). It may well be questioned, however, whether, in order to 'escape the tyranny of mere will,' it is necessary to discard Gierke's doctrine of the State as a real person and with Dr. Barker to invest the State's 'purpose of Law' with legal personality, thus making the Law sovereign over the State. It is in truth the State, not its purpose of law, which is the legal person, the corporation. In a balance of the State and the Law as two equal, twin, powers, there seems to be no place for the tyranny of the mere will of the State. Not as yet, it may well be thought, has Dr. Barker convincingly answered Gierke's argumentation on the problem of the relations of the Law and the State.

H. D. H.

Early Tudor Government. By KENNETH PICKTHORN. 2 vols. Cambridge. 1934. Henry VII, 192 pp., 10s. 6d. Henry VIII, 564 pp., 25s.

THESE two volumes differ very much in scope and character. The first is an analytical study of the resources, instruments and methods of government as Henry VII found and as he left them. The second is a mainly chronological study of the working of this machinery throughout the reign of Henry VIII on a scale varying with the richness and constitutional importance of the matter; thus the first twenty years of Henry VIII are covered in less than 100 pages, the next twelve occupy 350 pages, leaving 100 pages for the last six years. The Introduction to the second volume is found in the first, which is indispensable for understanding it, but forms by itself an independent essay on the earlier reign. There is no conclusion to the second volume; or rather the conclusions are to be found in some remarkable passages scattered throughout the work. And this arises from the very nature of the author's conception of history. He distrusts glib generalizations, and prefers to wring from the heart of the material, as it passes through his hands, the precise significance to sixteenth century men of the words and actions of their contemporaries. When he allows himself to draw a comparison with the past or point to an omen of the future, he does it with every precaution against easy abstraction and excessive simplification. This love of the concrete in all its complexity leaves to the reader an arduous but stimulating task, rewarded by a generous sprinkling of pregnant sayings. Whoever studies this work in all its facets will come away not only with a detailed knowledge of Tudor government, but with a much richer notion of contemporary ideas about government.

In short, Mr. Pickthorn has no preconceived theories, not even that a theory will emerge from an objective study of his material; and in fact no rigid theory or set of definitions does emerge. This method entails some sacrifice of elegance and, here and there, of lucidity; but in handling material there must be selection, and this is no indiscriminating collection of facts. If Mr. Pickthorn has one preconception, it is that in the sixteenth century government really was important, the first and most urgent need of a society which was not merely wrenched in a moment, but had for many generations been drifting, away from ancient moorings. In men's minds there were some ruling principles, but no rules, or at most 'the rules of government resembled the rules of conversation rather than those of bridge'; and, as the old and fading rules were those of ethics and of fundamental law rather than of government as such, the field lay very open. Men would do much, and suffer much, in order to be governed; in government 'the most active and decisive institution was the kingship,' and a king who would govern had little to fear. But he must govern, not merely perform antics; his conversation (or even monologue) must convey a meaning, and must not contradict all the prejudices of all his listeners at once. And, in governing, he must use perforce the instruments at hand, and would be foolish not to use them all, not merely Council, but Parliament, judges, gentry, and clergy too. Even the feudal nobility had their uses; only the monasteries seemed to be an instrument too refractory, forged of precious metal which might be melted down and used to make a firm alliance (firm at least for two generations) between the Crown and the gentry. The jurisdiction of Rome could by

no means be an instrument of royal government, and was cast aside. Out of all this, and out of the breach with Rome above all, began to arise a doctrine of sovereignty, ill-defined but real—a personal sovereignty of the king, but already one to which the other elements were not merely accessory but indispensable in fact. So of Gardiner's 'De Vera Obedientia' Mr. Pickthorn writes (p. 278): 'he had put in an English form and with an English relevance one of the main philosophies of political obligation, one which was for three-quarters of a century to dominate English politics, then for another three-quarters to be attacked and at last dominated, only to become, with no essential modification, the captor of its conquerors, and to reign for a century and a half as the omnicompetence of Parliament when it had lost the heart to proclaim itself as the divine right of kings.'

This is one of those passages which reveal the thesis and the conclusion of the work. A few others may be noted, and more may be found by reference to the larger titles in the index, such as Church, Council, Crown, Law, Papacy, Parliament, Supremacy (the title Sovereignty does not occur). The fifth chapter in the first volume discusses very ably and subtly the relations between 'Law and Statute, King and Crown'; a few examples in the second volume are passages on jurisdiction and sovereignty (pp. 135, 211, 235), on the difficulties of More's standpoint (p. 269), on the failure of the Pilgrimage of Grace (pp. 368-70), on Henry's speech to the Parliament of 1545 (pp. 497-501), on the personal Supremacy (pp. 445, 485). The last may be cited as an instance both of Mr. Pickthorn's anxiety not to overstate but always to qualify, to be concrete without being definite where definition would distort, and of the knotty, cumulative construction of his sentences. 'On the other hand, royal as the supremacy was, over-royal as it might appear, and synodal as on the whole it had so far happened to be, it was very parliamentary too, and if those adjectives should ever be in mutual opposition this statute of 1543 [for the Advancement of True Religion] would be an instance of ecclesiastical supremacy at its supremest in parliament, of extreme powers attributed (then delegated?) to Henry VIII by name (then not to another king?) by act of parliament.'

Besides these greatest matters, or rather contributing to elucidate them, are close discussions of each of the decisive steps in legislation (including, for example, the four Acts of Succession, pp. 233, 248, 290-6, 487-8) and in action (e.g. Pilgrimage of Grace, pp. 305-372); of the Statutes of Uses and of Wills (pp. 131, 172, 282 ff., 440-1); of the Act of Proclamations (pp. 414-8); of parliamentary privilege (pp. 53-4, 465-77); of revenue and taxation; and much else. Your reviewer, being no lawyer, cannot criticize the interpretation of statutes; but the picture here given of how law is made and modified is convincing. It is Mr. Pickthorn's belief that Henry VIII himself was the regular mainspring of government, not merely the wilful tyrant buffeting society this way and that, nor the tool of the *novi homines* as Mr. Belloc would have us believe. The tyranny is not ignored; beside the Elizabethan tact of Henry's moving speech to Parliament in December, 1545 (p. 497) may be set this incident (p. 453): 'Sir Edward Knyvett, for an assault within the court, "was condemned to have lost his hand that he struck with: the king's master cook ready with his knife to have done the execution", when the royal order to stay came, "and then the officers of the household sat again and then the king pardoned him".' But the 'hero' of the

work is the king, not for the breach with Rome, nor as an 'architect of Parliament', but just because he succeeded in *governing England* (and Wales too, for the first time) by the instruments and methods which lay to hand.

Minor blemishes are the excessive length of some sentences, owing not to verbosity but to the compression into a single period of many qualified considerations; the habit of weaving even long quotations into the grammatical structure of the author's comment upon them; and the occasional obscurity of the very pithy footnotes, again owing to extreme compression. Sometimes the author's buoyancy seems to sink beneath the cumulative weight of his own method. But this is only the reverse side of great merits; words are not wasted, but the finer points are never ignored for the sake of brevity or tidiness. To sum up, Mr. Pickthorn has given us, with infinite labour, a minute analysis from which, if not a synthesis, at least a faithful synthetic picture does emerge; the first volume will no doubt be widely used by students, the whole work will be salutary for lawyers by reminding them of the fluidity, the political complexion, of law, and for historians by showing them how law in turn seizes and fixes by degrees the shifting kaleidoscope of political moments.

C. W. C.

Proceedings of the Maryland Court of Appeals, 1695—1729.

Edited by CARROLL T. BOND, Chief Judge of the Maryland Court of Appeals, with the collaboration of RICHARD B. MORRIS, Assistant Professor of History in the College of the City of New York. American Legal Records: Vol. I. The American Historical Association, Washington, D.C. 1933. li and 673 pp.

WITH the appearance of 'Proceedings of the Maryland Court of Appeals, 1695—1729' the new series of 'American Legal Records' has been inaugurated under the auspices of the American Historical Association. Although many essays and monographs on aspects of American legal history have been published during the nineteenth and twentieth centuries (see, e.g. 'Select Essays in Anglo-American Legal History,' 3 vols., Boston, 1907-9), there has been hitherto no concentrated effort on the part of scholars to rescue the study of the historical development of law in America from a general neglect. This has been most regrettable, for, in the words of Mr. Evarts B. Greene, who has written the Foreword to the present volume, 'there is much to be learned in a study of the processes through which American legal institutions developed out of, and were gradually differentiated from, the English law' (p. iii). The new series represents the common interest of American historians and legal scholars in American legal history; and, moreover, both these groups of scholars are now actively engaged in the task of editorship. With this co-operation the success of the series should be assured.

The first step in executing the programme of those responsible for the new series is to 'rescue from the obscurity of state archives and other depositories the manuscript records of the most important colonial courts.

especially those of last resort' (p. iii). If one may judge from the scholarly care which has been devoted to this first volume of the series, and not less from the interest and value of its subject-matter, the 'American Legal Records' should do much, in the progress of time, to place the study of American legal history upon a solid basis of textual material and to give it also a large place both in legal and historical science and in legal education. The study of this material will, furthermore, it is believed, illumine the development of political, economic, and social, as well as strictly legal, institutions.

This initial volume of the 'American Legal Records' has been framed on the general lines of each of the volumes in the Year Book series of the Selden Society. While by far the larger part of the book is filled by the transcript of the judicial records, this is prefaced by a learned Introduction from the pen of Mr. Carroll T. Bond, chief judge of the Maryland Court of Appeals. In his own words, the text as here printed includes 'full transcriptions of proceedings in the courts from which the cases were removed for review, together with narrations of proceedings in the reviewing court; and it contains a few records of decisions of the Privy Council in England as the final tribunal at home.' 'The book is not, however,' Mr. Bond is careful to add, 'a law report, of the nature of those that form so large a part of the equipment of modern lawyers in English-speaking countries, and it cannot serve the purposes of a report, for often the grounds of decision are not made known' (p. vii). Mr. Bond's Introduction to the text is a valuable contribution to both English and American legal history, for throughout he has taken pains to observe the close relation between legal developments in England and those in Maryland. He deals successively with the following topics:—the provincial charter; the distribution of the lands; the settlers of the province: social and economic background; the Courts of justice and their records; the distribution of jurisdiction; beginnings of the jurisdiction in error and on appeals; the attorneys; the supply of law books; revival of final appellate jurisdiction; the text of the present record; the judges of the Court; Court procedure; appeals to the King in Council; the cases before the Court. This bare list must suffice as an indication of the fruitful field which Judge Bond and Professor Morris, as editors, have tilled.

Without attempting to enter into details in the present brief notice, the point should be stressed that in the 'Proceedings of the Maryland Court of Appeals' the reader is able to observe the workings of the English legal system, as transplanted to one of the American colonies, during the period from 1695 to 1729. To some the chief interest will attach to the constitution of the Courts and their procedure, including appeals to the King in Council; and not the least part of this interest will be focused on the use of the jury and the application of the English writ-system in colonial judicial procedure. Passing over the criminal cases (see pp. xlvii-viii), it may be noticed that included among the writs employed in the civil cases recorded in this volume are those of account, debt, assumpsit, covenant, trespass *quare clausum fregit*, and ejectment. Although Mr. Bond's comments on a few of the local peculiarities of the cases begun by these original writs are instructive (pp. xli-li), one can but regret that he did not elaborate this portion of his Introduction. In England and America alike the writ-system has been one of the main factors in legal development. 'Knowledge of the procedure in the various forms of action,' Maitland has remarked in his 'Forms of Action,' 'is

the core of English medieval jurisprudence'; and to a large extent this same knowledge is essential to an understanding of the growth of English law in its Maryland environment. Not less important is our knowledge of the use of the jury in cases begun by writ; and upon this aspect of the legal history of Maryland some of the cases in the present collection are instructive (see pp. xxiv, 1—li, 74—83, 109—114). There are, for example, cases of dispute over boundary lines which represent both the earlier practice of juries of twelve and the later practice of juries of three or of surveys made by the sheriff and surveyor only (see pp. xl, 1—li, where references to the cases will be found); and in its essential features this later practice has persisted to the present day (p. li).

Mr. Bond deals briefly with the Maryland Court of Chancery (see pp. xvi, xxxviii, xlvi; and compare Wilson, 'Courts of Chancery in the American Colonies,' *Select Essays in Anglo-American Legal History*, Vol. II, pp. 779—809); but he does not make it clear what function, if any, the Chancery had in the matter of issuing the common law writs (see, however, p. xxxi). In Maryland, until 1661, the governor had acted as chancellor; and as such he was keeper of the seal of the province. He was not only judge in equity for the province, but from him all patents, territorial and governmental grants, original processes, licences, and many other public documents took their origin (see Osgood, 'The American Colonies in the Seventeenth Century,' Vol. II, 1904, pp. 61, 67, 279, 295). From 1661 to 1699 the Chancery was divorced from the office of governor; but during the greater part of the period covered by the present collection of records (after 1699) the Chancery Court once more appeared as a Court of the governor, assisted by some of the justices (p. xvi). Was it the function of the Chancery Court, during the period from 1695 to 1729, to issue original writs? Judging from the practice of the English Chancery, it would seem clear on principle that this must have been one of the functions of the Maryland Chancery; but of that one needs definite historical proof. This is a problem which Mr. Bond may be willing to solve for us at a later time.

In concluding this brief notice it may be remarked with assurance that the series of 'American Legal Records' has been well begun. With the gradual accumulation of materials similar to those in this Maryland volume a solid foundation will be laid for the study in detail of those processes of legal development which lie at the basis of the legal systems of the several States of the American Union at the present day.

H. D. H.

The Law Quarterly Review. Edited by A. L. GOODHART, D.C.L., LL.D., Professor of Jurisprudence in the University of Oxford. Jubilee Number, 1885—1935. January, 1935. London: Stevens & Sons, Ltd. 262 pp. (7s. 6d. net.)

IN Michaelmas Term, 1900, and Hilary Term, 1901, a series of lectures was delivered at the request of the Council of Legal Education in which a most interesting survey was made of the changes in English Law during the nineteenth century. It was a happy thought of the learned editor of

the *Law Quarterly Review* to devote the January issue of the *Review*, which has now attained its fiftieth birthday, to a similar symposium dealing with the developments in the various departments of English Law which have taken place since its first publication and many of which have been influenced in no small degree by the opportunities for discussion and criticism afforded by its pages. Of the brilliant company who delivered the lectures dealing with the nineteenth century only three survive, but it is pleasing to note that one of them, Sir Arthur Underhill, has been able to join in the present enterprise and thus form a link between the present and the earlier survey.

All the contributors may be said to be experts on the subjects with which they deal, and the result is the production of a combined work of unique value not only to law students but to all who desire to obtain a clear and concise exposition of the modern tendencies of legal evolution. It is a matter for sincere congratulation that Sir Frederick Pollock has been able to participate in the production of this historical number of the *Review* which he did so much to establish, and also that Mr. Justice Oliver Wendell Holmes, whose recent death we all deplore, survived to send his felicitations to a publication to which he was one of the earliest contributors.

We congratulate the editor on the production of what we are sure will prove a collection of no ephemeral character but of abiding value.

D. T. O.

Roscoe's Digest of the Law of Evidence on the Trial of Civil Actions. Twentieth edition. By JAMES S. HENDERSON, of the Middle Temple, Barrister-at-Law. Two volumes. London: Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. 1934. clxxii and 1520 pp. (£3 net.)

THIS book was first published in 1827 and at one time or another two judges of the Queen's Bench, two puisné judges in India, one county court judge and a vice-warden of the Stannaries have been concerned with the succeeding editions. Its possession of these distinguished sponsors and its popularity with the profession ought, we suppose, to be enough to reduce any review to complimenting the present learned editor on maintaining the standard of the earlier editions and to pointing out the few trivial errors that happen to catch the reviewer's eye. If we criticize the work on a broader ground it is one by no means peculiar to Roscoe, but is noticeable in a score of treatises equally venerated and popular; and it is a criticism of which nobody concerned with the production of such literature is likely to take the slightest account. Still, here it is for what it is worth. The first edition of Roscoe had only 476 pages of text against the 1,520 pages of the twentieth. It is incredible that, even in the lapse of a century, the law of evidence should require some 1,100 extra pages for treatment. The real reason for the expansion is the incorporation by a long series of editors of a vast amount of matter which is substantive law and not the law of evidence. The result is a certain lack of form in exposition and a tendency to make the book something like a digest of case law, and that is a fate which has befallen many

another treatise whose author's name is at once a profitable asset and little more than a label for the book which he originated. But the English practitioner likes his books to be ponderous and expensive. What would happen to Roscoe if the next editor jettisoned half the matter (as he well might) and the publishers halved the price?

Taking this edition on its professed topic, we suggest that the rule in *Rylands v. Fletcher* ought to be treated separately from negligence and nuisance (pp. 741, 774, 775), for the rules of evidence are certainly not the same for all these three heads of liability. Next, trespass to the person ought to be introduced as a distinct topic, for evidence as to accidents on the highway has undergone a notable change during the past forty years: *Gaylor & Pope, Ltd. v. Davies & Son, Ltd.* [1924] 2 K. B. at pp. 82—84. At pp. 43—44, a reference to *Lal Chand Marwari v. Mahant Ramrup Gir* 42 T. L. R. 159 might have been added. In the table of contents at p. ix 'Action for' should be inserted before 'wrongful distress,' 'seduction' and the other torts in this column.

P. H. W.

The Law of Torts. By Sir JOHN SALMOND. Eighth edition. By W. T. S. STALLYBRASS, D.C.L., Fellow and Vice-Principal, Brasenose College, Oxford; University Reader in Criminal Law and Evidence. London: Sweet & Maxwell, Ltd. 1934. lx and 712 pp. (30s. net.)

IN this new edition of Sir John Salmond's work Dr. Stallybrass has, greatly to the advantage of students, abandoned the method adopted in his previous (seventh) edition of introducing new matter by way of Excursus and Notes. He has embodied in the text the results of his study of the subject and, in so doing, we think he has greatly improved the work as a whole. He has rightly, in our opinion, modified the original arrangement of the work by providing for a separate treatment of Negligence in its various aspects, as there is no doubt that most recent advances in the development of tortious liability have been in a more extended conception of the duty of carefulness in social and business relations. At the same time, to speak of negligence as an independent tort seems to us a darkening of counsel and has led to much misunderstanding on the part of young students. Sir John Salmond was emphatic in pointing out that negligence is not *per se* a wrong: it is only a wrong when it amounts to a breach of a duty of carefulness, and it is only the negligence which is a breach of this duty which can be classed as a tort. This, of course, is elementary, but it needs to be said. It follows that to avoid misconception it is important in speaking of actions of negligence that the term 'negligence' should be qualified by reference to the duty involved.

We do not regard the introduction of the short chapter on Forms of Action at the beginning as a desirable change. No doubt this should appear somewhere, but it would have been better, we think, to have left it to come in more naturally in connection with Trespass to Land as in the former edition. As it stands, it looks like a somewhat bizarre

insertion, postponing the symmetrical treatment of the subject which follows in the author's opening chapters.

The book has been most carefully and thoroughly overhauled and we can sincerely condole with the learned editor that the labours of the Committee on Law Reform with resulting legislation have made a further revision of the text so quickly necessary.

D. T. O.

Public Rights in the Seashore. By H. GALLIENNE LEMMON, M.A., LL.M. (Cantab.), Solicitor and Notary Public. London: Sir Isaac Pitman & Sons, Ltd. 1934. xvii and 329 pp. (30s. net.)

A VALUABLE contribution to the literature of the foreshore, this book should find a place on the shelves of many who are interested, practically or academically, in its subject-matter.

The author's study of the cases and books has clearly been of the most thorough character, and we only noticed one omission, *viz.* section 44 of the Town and Country Planning Act, 1932, which expressly preserves existing rights in regard to the exercise of powers under that Act.

In fact so exhaustive is the consideration of cases that the author even gives, presumably as an indication of what would not be considered proper conduct upon the foreshore, the facts of a case in 1663 in which a man was punished 'for showing himself naked and throwing down bottles "pist in" among the people in Covent Garden, *contra pacem* and to the scandal of the Government.' *Opera demonstravit.*

Mr. Lemmon throughout valiantly endeavours to uphold the rights of the public as against those of the Crown and, more especially, those of grantees from the Crown, but case law forces him to admit that, while some claims, such as for fishing and navigation, are well established, much public use of the foreshore, *e.g.* for bathing and other recreation, is, though in practice generally permitted, in strict law forbidden. 'It is only when private owners invoke the strength of the law that injustice may arise, and the fact that so few of them ever attempt to do so, or to restrict the public in a reasonable enjoyment of the foreshore, is no argument against an endeavour to show how the law may, without undue strain, be brought more into consonance with modern thought, and how the public may be legally placed in the possession of what at present they only enjoy at the pleasure of an individual.'

We cannot so wholeheartedly approve the form as the substance of the book. The style is inconsistent, and in the same paragraph may occur a pleasing but almost 'flowery' metaphor and a number of disjointed, almost unrelated, sentences, while peculiar punctuation sometimes makes re-reading of a passage essential to full appreciation of its import. And although the author admits that the English and Scottish law are not necessarily the same, the treatment of English and Scottish cases is sometimes tangled.

But these defects merely of form do not detract substantially from the merits of the work, at any rate as a work of reference, and the only important criticism that can fairly be made against the general arrange-

ment of the book is that it is exceedingly difficult to ascertain the views of the writer himself upon any controversial point, for an almost dogmatic statement is more than likely to be followed, sometimes after an interval of many pages, by drastic modification; in fact, as he himself somewhat quaintly says: 'It must always be borne in mind that later qualification of otherwise general statements is sometimes necessarily reserved.'

R. H. K.

Tschechoslowakische Gesetze. I, Das öffentliche Recht der Tschechoslowakischen Republik. Edited by Dr. RUDOLF SCHRANIL, Professor of Law in the University of Prag, and Dr. FRIEDRICH JANKA, of the same University. 1. Teil. Die Verfassungsgesetze. xx and 588 pp. Geb. 120 Kč. 2. Teil. Staatsrechtsquellen ausser den Verfassungsgesetzen. xx and 847 pp. Geb. 150 Kč. Prag: Rolandsverlag. 1934.

THESE two volumes on public law form only a small part of the Roland Edition of the statutes of the Czechoslovakian Republic. The first volume contains the text of the written Constitution of February 29, 1920, and of the other constitutional statutes, as well as a valuable historical Introduction; while in the second volume, which is supplementary to the first, will be found the text of international and constitutional legal sources in which the general principles of the written Constitution and of the other fundamental statutes are applied in detail. The learned editors have supplied not only many notes explanatory of the texts, but also useful references to the literature which deals with them. At the end of each volume there is an alphabetical Index, accompanied by a list of technical terms with their German equivalents, which will facilitate reference. Apart from their value to lawyers and public men in Czechoslovakia, these two volumes will be read with interest by students of comparative law and political science. A third and final volume on general administrative law ('Allgemeines Verwaltungsrecht'), now in preparation, will complete that part of the Roland Edition which is concerned with public law ('Öffentliches Recht').

H. D. H.

Registered Land Conveyancing. By H. POTTER, Solicitor, Dean of the Faculty of Laws at King's College, London. Sweet & Maxwell, Ltd. 1934. 484 pp. (30s.)

MR. POTTER has never lacked the readiness to tackle subjects which a man of less courage and industry would have shunned. No previous book of his has made as great demands on these qualities as that on registered land conveyancing published last year. He has placed under a debt to him all those, an increasing number, whose duties compel them to explore

this grim maze of statutory provisions and rules. Probably no one but an official of the Land Registry possesses the mastery of detail necessary for appraising this work. So far as a mere amateur may comment on it, it is permissible to say that Mr. Potter's style has gained considerably in lucidity since his last publication, but he must admit a prejudice against such expressions as 'the palm being awarded to short terms of years' (p. 270). There is no doubt but that his book will render very great help to those who after acquiring a reasonable knowledge of real property law are compelled to know about the technical practice of registered land conveyancing. It is suggested that in the next edition Mr. Potter should devote greater space to explaining the position in regard to easements. The intention of the statement on p. 10 that most incorporeal hereditaments 'are incapable of registration since they are overriding interests' is difficult to understand in relation to what follows on pp. 271-4.

H. A. H.

Cases on Equity Jurisdiction and Specific Performance. Edited by Z. CHAFEE, Jr. and S. P. SIMPSON, Professors of Law in Harvard University. Published by the Editors, Langdell Hall, Cambridge, Massachusetts, U.S.A. 1619 pp. in two volumes. (\$8.)

THERE could be no better illustration of the thoroughness with which students are trained during their three years at the Harvard Law School than this book, which is designed to supply materials for a first course in equity, occupying not fewer than sixty class-room hours. It ought to be owned by every teacher of equity and by every English law library. For of 294 principal cases, of which either the whole text or a considerable extract is printed, 105 are English (including Irish). In addition the facts of many hundred other cases are stated as problems, while the number of cases cited is approximately fifteen thousand. The width of range and variety of interest of the book are exemplified by the two pages (with a reproduction of an eighteenth century aquatint) devoted to the history of Leicester Square before *Tulk v. Moxhay*, and the long list of references on the subject on p. 706.

As a trivial example of thoroughness one may mention the fact that whereas most writers (e.g. White and Tudor) take *Lester v. Foxcroft* (1701) as the leading case on part performance, the authors go back to *Butcher v. Stapely* (1685). It may be wondered whether any English lawyers except Sir William Holdsworth, who cites the case in Vol. VI of his *History* (p. 659), have read the case, or know that it was decided by the notorious Lord Jeffreys.

The reader's historical sense is stimulated by a number of pictorial illustrations, the originals of most of which are in the possession of the Harvard Law School. Portraits are included (among others) of Lord Ellesmere, Lord Nottingham, Lord Hardwicke and Lord Eldon. It is suggested that in the next edition some notable gaps should be filled by the addition of Sir Thomas More, the first and the most saintly of lay chancellors, of Sir Francis Bacon, Viscount St. Albans, the greatest

intellect of them all, whose orders left their mark for long on the procedure of the Court, and of Christopher Columbus Langdell, but for whom case books of this kind would probably not have been. The book is fittingly dedicated to two masters of equity, each supreme in his generation, the late James Barr Ames and Roscoe Pound.

H. A. H.

Theft, Law, and Society. By JEROME HALL, Professor of Law, University of North Dakota, etc., etc. Boston: Little, Brown & Co. 1935. (\$3.50.)

THEFT constitutes the central and typical phenomenon and problem of criminal law. It furnishes the preparatory school of the criminal classes; it is statistically by far the most common of all offences; and it out-distances all rivals in the rapidity and elasticity with which it follows, in the variety of its forms, changes in social and economic conditions. 'The law of theft is the heart of the really *criminal* law.' It is with these considerations in mind that Professor Hall has written the very readable and illuminating book before us. The first three chapters are devoted to an account of the development of the law of larceny in England (with its progeny of embezzlement and receiving), a development which was chiefly the work of the eighteenth century. 'The eighteenth century produced almost the entire law on crimes against property without violence.' The monstrous multiplication in that period of capital offences led to the reaction which, manifested at first, towards the end of the century, in the humane chicaneries of judges and juries, culminated in the far-reaching legislative reforms of the early nineteenth century. The greater part of the remainder of the book is occupied with a discussion of 'contemporary problems,' particularly in America; and herein especially of automobile thieves and of professional receivers, two types of criminal to whom American conditions offer singular facilities. In this, the more important section of the book, such topics are expounded as Federal anti-theft legislation, the Uniform Motor Vehicle Anti-Theft Act, the desirability of isolating the offence of receiving and of distinguishing the professional from the occasional receiver, the question of statutory presumptions of guilty knowledge, the danger of excessive statutory penalties, the problem of the juvenile car-thief, the co-operation of insurance organizations with the police. Though this is a learned and an amply documented book, it is not deficient in picturesque detail. A recent Missouri case contains a warning to lawyers. A local politician who had been indicted for the larceny of a referendum petition containing over 10,000 names, was acquitted on the grounds that petitions ceased to be mere paper when they were signed and became written instruments, and that at common law written instruments were not the subject of larceny. To illustrate the devices resorted to in the days before Sir Samuel Romilly's reform to avert death sentences for larceny, the author relates 'the celebrated case at Pevensy' where, on a charge of stealing a pair of breeches, the evidence being clear, the jury brought in a verdict of guilty. Learning to their dismay that by so doing they had sentenced the prisoner to death, the jury sought to modify their verdict. They were advised that they

could not do so by inserting the word 'not' before 'guilty'; but having heard that the Lord Chief Baron was dining at a private house in the neighbourhood they sent an emissary to consult him, and were advised that they might add the words 'of manslaughter': this course was accordingly taken, and the verdict was duly set aside.

M. S. A.

Declaratory Judgments. By PROFESSOR BORCHARD. Cleveland: Banks-Baldwin Law Publishing Co. 1934. xxii and 669 pp.

IN this volume the institution of the declaratory judgment is examined from the historical and analytical points of view and its place in what the author terms 'the armory of judicial therapeutics' is also discussed. There is no other work on the subject in any language which can compare with it, for it covers the ground with a thoroughness and care which it would be difficult to parallel in the case of any other text-book on civil procedure. One stands aghast at the amazing learning which it displays, though the author's task was, perhaps, facilitated by the fact that the subject was dealt with from a comparative point of view by the International Congress of Comparative Law at The Hague in 1933.

We in England owe this institution to Scots law. The benefits of the Scots action of declarator impressed Lord Brougham so forcibly that he pressed the matter on the attention of Parliament for many years until he was at length successful in securing the adoption of the Chancery Procedure Act of 1852, which was the progenitor of Order XXV of the present Rules of the Supreme Court. On June 14, 1934, President Roosevelt signed the United States Declaratory Judgments Act, of which Professor Borchard was a co-draftsman, and the future of the Declaratory Judgment as a procedural institution now seems to be assured.

Professor Borchard's treatise is a monument of scholarship which is worthy of the author's reputation. This is, possibly, the highest praise that could be bestowed on it. Perhaps a former practitioner in the English Courts may be allowed, however, to express the opinion that declaratory judgments do not possess all the advantages which the learned author of this work claims for them. The cases in which the parties can 'remain gentlemen', as Professor Borchard says, and be satisfied with a declaration of their rights or liabilities in settlement of their differences, are in practice relatively few, certainly so far as actions of a common law nature are concerned. Otherwise this institution would be more frequently resorted to in commercial disputes.

H. C. G.

The Parliamentary Powers of English Government Departments. By JOHN WILLIS. Harvard Studies in Administrative Law, No. 4. Harvard University Press. 1933. 214 pp. (\$3.50.)

MR. WILLIS' stimulating essay was written before the publication of the Report of the Committee on Ministers' Powers, but he has briefly surveyed at the end the recommendations and limitations of that impor-

tant State document. Bearing in mind that he had not available the memoranda prepared by the departments for the use of that committee, the essay is a remarkable tribute to the industry of the author in collating the various exceptional powers of delegated legislation with which he is chiefly concerned. He analyses critically under the title, Final Statutory Rules, the provision that rules shall have effect as if enacted in the Act which authorises them, the conclusive evidence clause and skeleton legislation. He also traces the growth of Private Bill legislation by a department and the power to modify an Act of Parliament, as well as giving a general account of delegated legislation as a whole, describing its development and present features. To quote from the preface, the author endeavours to show to what extent the departments have replaced Parliament as the sole creator of new rights, but does not dare to guess the future.

Of the many interesting topics the explanation of the changing attitude of the Courts between 1894 (*Lockwood's Case*) and 1931 (*Yaffé's Case*), and the account of procedure by schemes call for special mention, but the essay must be read as a whole to be appreciated. That it was inspired by Lord Hewart's 'The New Despotism', may be surmised from the introductory remarks. It is certainly not the least valuable result of that contentious volume and is a reply in the field of research to the Lord Chief Justice's contribution to legal polemics.

E. C. S. W.

Snell's Principles of Equity. Twenty-first edition. By H. GIBSON RIVINGTON, M.A. (Oxon). London: Sweet & Maxwell, Ltd. 1934. clviii and 660 pp. (30s.)

An Epitome of Snell's Equity. By H. GIBSON RIVINGTON, M.A. (Oxon), and CLIFFORD W. RIVINGTON, B.A. (Oxon). London: Sweet & Maxwell, Ltd. 1935. xii and 267 pp. (9s.)

THE first edition of 'Snell' appeared in 1868; it attains its majority with this edition. No better evidence could be adduced of its merits and well-deserved popularity. It is the best book on equity, indispensable to candidates for the Bar and Solicitor's Final, and a handy reference work in practice. The storehouse of learning compressed in its pages is amazing, and the learned editor is to be congratulated upon his zeal and thoroughness, and his skill and care. The text has been brought up to date and rewritten where new decisions so demand. For example, *Att.-Gen. v. Jackson*, [1932] A. C. 365, dealing with the executor's right of retainer, has necessitated the re-casting of pp. 243—245; likewise at pp. 187—188, *Re Kempthorne* [1930] 1 Ch. 268, dealing with the equitable conversion by the statutory trusts for sale, of land held in undivided shares. At p. 9 *Berry v. Berry* (1929) displaces *Job v. Job* (1877)—equity prevailing in case of conflict; and at p. 47 *Re King* (1931) is an additional illustration of equal equities, the first in time prevailing. Among other interesting additions are *Williams v. Atlantic Assurance Co.* (1933), *Re Jones, Jones v. Cusack-Smith* (1931) and *Re Gillott's Settlement*

(1934). No case of importance has been omitted, and no new edition could be more satisfactory. At p. 98, l. 16, 'that' should read 'than'; p. 144, l. 6, 'appont' should read 'appoint.'

The authors emphasize that the epitome is not to be a substitute for, but a companion to 'Snell'. It is an admirable summary of the principles, which are clearly set out with reference to statutes and cases. The print is so arranged that the main points catch the eye; it is widely spaced and the industrious student may add his own notes on the cases. The name 'Rivington' is a guarantee of its accuracy.

T. E. L.

A Handbook of N. R. A. Second edition. Edited by LEWIS MAYERS, Ph.D., LL.B., of the New York Bar. New York and Washington: Federal Codes, Incorporated. 1934. xxiii and 842 pp.

THIS volume contains an 'analysis and compilation of the National Industrial Recovery Act and related statutes, federal and state, and of all executive orders, regulations, agreements, administrative rulings and judicial decisions relative thereto; together with a comparative presentation of typical provisions of the several codes of fair competition, the texts of the principal codes and summaries of all minor codes.' The constitutional lawyer who is interested in 'this huge experiment' would do well to read Professor Robert A. Mauser's article, 'Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act' in the *Georgetown Law Review*, January, 1934 (Vol. XXII, No. 2). For the purpose of this review we have selected the code of Fair Competition for Banks and the perusal of this code is illuminating to the reader whose knowledge of banking does not extend beyond the operations of the Big Five in this country; in particular we learn that bank employees are to have the right to organize and bargain collectively (a general feature of the codes which brings home to the English reader the different labour conditions which have hitherto prevailed in the United States) and that trust services are to be operated in accordance with the provisions of the Statement of Principles of Trust Institutions approved by the American Bankers' Association. The statement contains an elementary exposition of the leading principles of the law of trusts, and trust institutions are exhorted to maintain harmonious relations with the members of the Bar and not to engage in the practice of law. We may thus take comfort that our banking practice has little to learn from the other side of the Atlantic, as well as appreciate something of the magnitude of the task undertaken by President Roosevelt.

E. C. S. W.

Il Contempt of Court e la Specific Performance nel Diritto Inglese. By MICHELE DE ROSSI. Sweet & Maxwell. 1934. xx and 376 pp. (17s. 6d. net.)

Dr. Rossi's object in writing this monograph is to pave the way for future developments in the Italian law of civil procedure. How far analogies exist, in Continental law, to our rules relating to Contempt of Court and Specific Performance is a matter on which foreign jurists are not agreed. Professor Mendelssohn-Bartholdy, who dealt with the matter in 'Das Imperium des Richters' many years ago, did not regard them as an exclusive peculiarity of English law. Dr. Rossi agrees with him in substance, but maintains that it is only in England that the power of the Courts of justice to enforce their decrees and to keep order in their own house has reached full maturity.

The first part of his work is devoted to an investigation of these institutions from a historical point of view. His conclusions may be summarized by saying that he finds their origins in the early Germanic laws and not in the 'Contumacia' of the Canon Law.

The second part contains a description, in outline, of the English law relating to the author's two subjects, largely taken from standard works such as those of Oswald, Fry and Rawlins, and from Fox's well-known treatise on Contempt of Court. The English case law is not referred to. The book concludes with a comparative study of the two questions, and this to an English reader is the most interesting and valuable section. It is to be regretted that considerations of space did not permit of a more extensive development of this particular theme.

Dr. Rossi is to be congratulated on an able and interesting illustration of the employment of the comparative method of research. He is an extremely human person and some of his footnotes are very entertaining. One, in particular, which deals with the conception of a Nordic law purged of all contamination by alien influences is delightful.

H. C. G.

Private International Law. By G. C. CHESHIRE, D.C.L., M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Exeter College, Oxford; All Souls Reader in English Law, formerly All Souls Lecturer in Private International Law. Oxford: At the Clarendon Press. 1935. lx and 584 pp. (25s. net.)

WE may say at once that this work has come to stay. It will have no fleeting existence and will take an assured place among the limited number of English text-books on this important subject. We think we may go further and say that it will speedily become the text-book which all students beginning the study of the subject will choose as their guide. Westlake's treatise has always been a difficult book for students and has not improved under the successive accretions of later editors. Dicey's great work has become somewhat unmanageable in bulk, although still unrivalled as a methodical and clear exposition of principles. Foote has, like Westlake, suffered in respect of clearness of exposition by the

labours of editors. Dr. Cheshire's book has the merit of a clear and connected exposition of the whole field within manageable limits. He has, in our opinion, rightly omitted the law relating to nationality as having no direct bearing on Private International Law, at any rate of sufficient importance to justify the space allotted to it in the usual text-books.

D. T. O.

Gibson's Statute Law. Eighth edition. By ARTHUR WELDON, Solicitor, Honours 1881, and H. GIBSON RIVINGTON, M.A. (Oxon), Scott Scholar, Clement's Inn, Daniel Reardon and John Mackrell Prizeman, 1900. London: The 'Law Notes' Publishing Offices. 1934. lxiv and 808 pp. (£2 net.)

THE last edition of this most useful digest of and commentary on statute law was issued eight years ago after the property legislation of 1925. In order to deal adequately with the mass of legislation of the last decade, some curtailment of the earlier material has been found necessary and the editors have very wisely omitted the Workmen's Compensation Acts and, perhaps with less reason, the statutes dealing with Limitation of Actions. The Bills of Sale Acts are also omitted as being fully dealt with in other books. The subject-matter is arranged in alphabetical order, with clear explanations of the provisions, where necessary, and with useful notes and references to cases. Law students will find this an excellent reference book which should be constantly kept ready to hand.

Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice. Eleventh edition. By W. BLAKE ODGERS, M.A., of Balliol College, Oxford, the Middle Temple and the Western Circuit, and B. A. HARWOOD, B.A., of Christ Church, Oxford, the Inner Temple, and the Western Circuit. London: Stevens & Sons, Ltd. 1934. 8vo. lxxvi and 560 pp. (20s. net.)

No work has done more to lighten the task of the law student in finding his way through the mysteries of procedure than this work of the late Dr. Blake Odgers, which has now reached its eleventh edition. On its first appearance, in 1891, it at once took its place as a *vade mecum* of students and young practitioners, and continues to be a necessary text-book for any one who proposes to engage in the practice of the law.

The present editors have had a difficult task in view of the recent extensive changes in procedure. They appear to us to have discharged this task in a thoroughly satisfactory manner, having regard to the date of the issue of the new volume. At a time of rapid changes, like the present, it is impossible to keep thoroughly abreast with legislative activity and the operations of the Standing Committee on Law Reform are making the work of editors increasingly uncomfortable.

D. T. O.

Dictionary of Legal Terms and Citations. By H. A. C. STURGESS, Librarian and Keeper of the Records, Middle Temple, and A. R. HEWITT, Assistant Librarian, Middle Temple, London: Pitman & Sons, Ltd. 1934. 306 pp. (5s.)

PART I is a dictionary of legal terms and is fairly comprehensive. It is difficult to review a dictionary, but the following points may be noted. Borough English and Ancient Demesne are explained, but no mention is made of Socage, and it is not indicated that the custom of Gavelkind has been abolished. The definitions of Fee Simple, Fee Tail, Equity of Redemption and Usual Clauses require amendment. Ademption is dealt with, but Satisfaction and Performance require further explanation. Preference and Retainer are not explained in connection with the rights of personal representatives. Attempts, Plea Rolls and Year Books are not mentioned. A reference to section 4 (3), S. G. A., 1893, under Acceptance might have been added. Of course, a dictionary is not an encyclopædia, and these omissions may not detract from the merits of a book, which will be very useful to students. Part II, which consists of citations and abbreviations of the Law Reports of Great Britain and the Empire, is really comprehensive.

Constitutional Laws of the British Empire. By E. SALANT, LL.B. (Lond.). London: Sweet & Maxwell, Ltd. 1934. viii and 239 pp. (10s. 6d.)

THIS book, compiled for the use of students, is a very useful outline of the constitutional law relating to the Self-Governing Dominions, Colonies, Protectorates and Mandated Territories. For obvious reasons the Constitution of India is not dealt with. The actual texts of Constitutions of Canada, Australia, South Africa and the Irish Free State (together with amendments), the Statute of Westminster, 1931, and the Colonial Laws Validity Act, 1865, are set out in the Appendices. The ten chapters constituting the body of the work are a clear, accurate and instructive commentary on the present constitutional relations of the various countries within the British Commonwealth. A very good account is given of the International Status of a Dominion and the Right of Secession at pp. 28—33. There is a table of seventy cases, and an index. The book supplies a real need, and is an excellent introduction to all concerned with this wide subject.

Annual Survey of English Law, 1933. London: Published for the London School of Economics and Political Science by Sweet & Maxwell, Ltd. 1934. xxxii and 394 pp. (10s. 6d.)

THIS follows the method and scope of treatment of its predecessors, and the same high standard is maintained. The law, that is, legislation, case law and literature, is grouped under fourteen subject headings, and

the treatment is comprehensive and accurate. Attention is drawn to a variety of recent legislation for expediting and simplifying the legal process. The need for further amendment is emphasized at pp. 121, 182, 190 and 200, and the comments made by the contributors are really stimulating. Mercantile Law predominates in the number of pages devoted to it, followed by International, Criminal, Property and Conveyancing, Industrial Law and Tort. Pages 8—28 indicate the vast amount of current research into legal history. In every subject the necessity for law reform is made quite clear. Every teacher and student will find this number extremely useful.

Indian Partnership Act, with a Commentary, Critical and Explanatory. By the Rt. Hon. Sir FREDERICK POLLOCK, Bart., K.C., D.C.L., of Lincoln's Inn, and the Rt. Hon. Sir DINSHAH FARDUNJI MULLA, Kt., C.I.E., M.A., LL.D. Calcutta: The Eastern Law House. 1934. xxiii and 276 pp. (Rs.7 net.)

IN this work will be found the text of the Indian Partnership Act, 1932, together with a valuable commentary upon each of its seventy-four sections. By arrangement with the publishers of Sir Frederick Pollock's 'Digest of the Law of Partnership' so much of the comments and illustrations published in that work as seemed likely to be found useful in India has been reproduced in this new commentary on the Indian Act. The Appendix contains the Reports of the Special and Select Committees, the text of the English Partnership Act, 1890, and the text of the Indian Contract Act, 1872, Chap. XI. Infinite care and great learning have been used in the preparation of a book which will be most useful to students, practitioners, and judges in India. It will also be read with profit by students of comparative law. The lamented death of Sir Dinshah Mulla, the distinguished judge and legal writer, colleague of Sir Frederick Pollock in the authorship of the present volume, was announced shortly before its publication.

H. D. H.

Introduction to Roman Law. By the late WILLIAM A. HUNTER, M.A., LL.D., of the Middle Temple, Barrister-at-Law. Revised by F. H. LAWSON, M.A., of Gray's Inn, Barrister-at-Law, Fellow and Tutor of Merton College and All Souls Reader in Roman Law in the University of Oxford. Ninth edition revised. London: Sweet & Maxwell, Ltd. 1934. xvi and 212 pp. (10s. net.)

WELL known to generations of students, the late Dr. Hunter's 'Introduction to Roman Law', a beginner's book distinguished by its ease, clarity, and learning, has been revised, in the light of recent research, by a thoroughly competent scholar. Extensive alterations have been made

by Mr. Lawson in many parts of the book; and he has now returned to the order used by Gaius and Justinian in their treatment of the particular contracts. In the account of ownership and possession he has omitted some of the details which seemed to be inappropriate to an introductory book; and, in general, he has revised Hunter's small classic with a view to making it serve, even more effectively than before, the purposes of those who come to the study of Roman Law for the first time. To such this new edition will prove most useful.

H. D. H.

Constitutional Law of England. By E. W. RIDGES. Fifth edition. By A. BERRIEDALE KEITH, D.C.L., D.Litt., of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1934. xlviii and 672 pp. (25s.)

THIS new edition has been thoroughly revised and largely rewritten by Professor Keith. It has been scrupulously brought up to date, and there is a wealth of reference to authorities and to latest researches in the footnotes. Notwithstanding the omission of the details of ecclesiastical matters and of current taxation, the book has been enlarged by nearly two hundred pages, which deal with the growth of administrative law, legislative and judicial powers of the Executive, control of the House of Commons by the Cabinet, judicial tenure, prerogative, remedies of the subject against the Crown, and the Statute of Westminster, 1931. A table of statutes and cases is also added. Some ninety pages are now devoted to the Dominions, Colonies, Protectorates, Mandated Territories and the Indian Empire. The book is overflowing with detailed information, and a beginner may, perhaps, find it rather heavy going. The index reference to the Court of Star Chamber should be 237 not 257.

Concise Handbook of the Law Affecting Landlord and Tenant. Second edition. By R. BORREGAARD, M.A., of the Inner Temple, Barrister-at-Law. London: Pitman & Sons, Ltd. 1934. li and 292 pp. (8s. 6d.)

FOR convenience the author deals with the subject in two separate parts: (1) the general law in its present condition; (2) agricultural holdings, business premises and tenancies within the Rent Restrictions Acts and the Housing Act. Recent cases and statutes have been incorporated and explained. A reference might, perhaps, have been made to the extremely useful judgment of Maugham J. in *Flexman v. Corbett* [1930] 1 Ch. 672 on *usual* covenants. The book is satisfactory in every way and justifies the claims made for it in satisfying the requirements of the student and being a handy reference for the practitioner.

Gibson's Criminal and Magisterial Law. Tenth edition. By ARTHUR WELDON and L. CRISPIN WARMINGTON. London: 'Law Notes' Publishing Offices. 1934. liv and 366 pp.

THIS is a workmanlike résumé of crimes, procedure and evidence, together with a brief account of the criminal tribunals. General principles of criminal law are given no more than cursory treatment, and very little attempt is made to test or criticize traditional views, but this is hardly to be expected when so large a field has to be covered in a book of this size.

J. W. C. T.

British Year Book of International Law, 1934. Fifteenth year of issue. Humphrey Milford, Oxford University Press. vi and 240 pp. (16s.)

WHATEVER opinion be held of the recent works of the world's politicians in international affairs the writers on international law have not, so far as can be judged from the Year Book, allowed their standard to deteriorate. Two articles are given up to Private International Law, one on Renvoi and the Soviet Law of Succession, by Mr. Dobrin, the second by Mr. W. E. Beckett on Classification. On the side of Public International Law Mr. V. K. Johnson writes in support of Canada's title to the Hudson Bay and Hudson Strait, Mr. B. E. King on prescription of claims, Mr. Fitzmaurice on the question whether treaties need ratification, and Mr. Wade on the relations of an English act of State with International Law, while Mr. Llewellyn Davies gives the result of research into the treatment of enemy property during the Anglo-Dutch wars of the seventeenth century. The remainder of the number is taken up, as usual, with notes, decisions of tribunals, reviews, and bibliography.

J. W. C. T.

Principles of Mercantile Law. Third edition. By J. CHARLES-WORTH, LL.D. (Lond.), of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1934. xl and 382 pp. (8s. 6d.)

WE reviewed the second edition of this book in Volume IV (p. 416). The appearance of a third edition is adequate proof of its well-deserved popularity. We repeat, that it is a work of great merit; the leading principles are clearly and concisely stated, and illustrated by the very latest decisions. As with *Lever Bros. v. Bell* in the second edition, so with *Cammell Laird, Ltd. v. Manganese Bronze, Ltd.* at p. 134 of the present edition, the House of Lords has reversed the decision of the Court of Appeal since the book was published. The section on carriage by rail has been rewritten, and that on deeds of arrangement has been enlarged.

The learning of *Nixon v. Erith U. D. C.* at p. 37 has now been displaced by the Local Government Act, 1933, ss. 2 and 266, and Part I of Sched. XI. With the above exception the work is absolutely up to date, and among recent cases we note *Arcos, Ltd. v. Ronaasen* (1933), *Aslan v. Imperial Airways, Ltd.* (1933), *Vanbergen v. St. Edmunds Properties, Ltd.* (1933), and *British Russian Gazette v. Associated Newspapers* (1933).

World Court Reports. Edited by MANLEY O. HUDSON, Member of the Permanent Court of Arbitration at The Hague, Bemis Professor of International Law, Harvard Law School. Vol. I, 1922—1926. Washington: Carnegie Endowment for International Peace. 1934. xxix and 777 pp. (Vol. II will be published at a later date.) (\$5 per set.)

THIS collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice, Volume I of which is now issued under the competent editorship of Professor Manley Hudson, is intended to be the beginning of a series of reports of the proceedings of the Permanent Court and to carry on the good work already accomplished by the two volumes of The Hague Court Reports edited by Professor James Brown Scott. The value of these volumes to students of international law cannot be over-estimated, as they offer within a reasonable compass a fairly complete picture of the development of the 'jurisprudence' of the Court, besides supplying an easy access to material necessary for the comprehension and solution of the difficult questions of international relations which are now constantly arising.

The Australian Digest, 1825—1933. Vol. I, Abandonment to Book Debts. The Law Book Co. of Australasia, Ltd., Sydney, Melbourne and Brisbane. 1934. lxxii and 723 pp. (Price to original subscribers, 55s. per volume.)

THIS new digest of Australian case law is being compiled under the direction of an editorial and consultative board composed of lawyers distinguished in every department of law. The work is planned on a most complete and ambitious scale, and, judging by the volume before us, will very adequately fulfil the purpose announced by its authors, that of furnishing a complete digest of Australian case law. The printing and format of the volume are both excellent and leave nothing to be desired.

Lappiske Rettstudier. By ERIK SOLEM. Oslo: H. Aschehoug & Co. 1933. 342 pp.

THIS is an interesting study of the customs of the Lapps, more particularly of those living in the Norwegian Finmark. Most of these

customs relate to the herds of reindeer which form the principal means of sustenance of these very primitive people. The author was for many years a judge in the northern districts of Scandinavia and so had an unusual opportunity of studying and recording the various customs with which he deals.

H. C. G.

The Law Reports of Palestine, 1920—1933. Selected and edited by Sir MICHAEL McDONNELL, Chief Justice of the Supreme Court of Palestine. London: Crown Agents for the Colonies. 1934. 923 pp. (42s.)

THIS volume is the first to contain collected reports of cases on the law of Palestine. The cases are more than four hundred and fifty in number and cover the period during which the Civil Administration of Palestine has been in existence. Some of the cases are of considerable interest, especially to Muhammadan lawyers. Moreover, those concerned with the teaching or study of Private International Law will be well advised not to ignore these reports.

H. C. G.

Law of Procedure. Fifth edition. By W. NEMBARD HIBBERT, LL.D. (Lond.), of the Middle Temple, Barrister-at-Law. London: Pitman & Sons, Ltd. 1935. xv and 135 pp. (7s. 6d.)

THIS new edition will be welcomed by students owing to the numerous and important changes which have been made in civil procedure. It has been carefully brought up to date, and six new statutes are incorporated. The work is accurate, and it is a sound introduction to civil procedure. Read in conjunction with larger works, such as 'Odgers on Pleading and Practice', it should prove invaluable, particularly for revision purposes.

The Bench, the Bar and the Bear-Garden from the Well of the Court. By "VERITAS". London: Sir Isaac Pitman & Sons, Ltd. 1935. 76 pp. (2s.)

A SMALL volume of reminiscences giving the author's impressions of the Courts and the judges together with a number of interesting episodes occurring in his practice during the last half-century.

The American Doctrine of Judicial Supremacy. CHARLES GROVE HARRIS and other Editors. Second edition. Revised and enlarged. University of California Press; (in Great Britain and Ireland) Cambridge University Press. 1932. xviii and 705 pp. (27s.)

THIS book was received for review during 1934; its subject-matter—the authority of the judiciary over legislation particularly in relation to Federal law—naturally receives little attention in this country. But the issues raised are of interest to us—judicial interference with social and economic reform and endeavours to limit the range of judicial legislation in particular. Moreover the day may not be far distant when the Federal Court of India presents similar problems. Mention may be made in this short notice of Chapter III (Development of the Practice of Judicial Review of Legislative Acts in the Colonial and Revolutionary Periods), and Chapters IX to XI (Legal Theories and Principles Involved and Opposition to the Theories and Practice of Judicial Review).

Other books and publications received (some of these will be reviewed in the next issue):—

Handbook of the Cambridge Law School, 1934—1935. Cambridge University Press. viii and 146 pp. (2s. 6d.)

Valeur de la Liberté et Adaptation de la République. By PROF. JOSEPH-BARTHÉLEMY. Paris: Recueil Sirey. 1935. (24 fr.)

International Organization. By R. YORKE HEDGES, LL.D., of Gray's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1935. x and 212 pp. (10s. 6d.)

Conférence sur L'Enseignement du Droit International et des Relations. Lwów, 26—28 Juin, 1934. Correspondence, Procès-Verbaux, Matériaux. 1935. Institut de Droit Constitutionnel et de Droit International Université Jean-Casimir.

Die Volksbestimmung im Saargebiet. Von VIKTOR BRUNS. Berlin: Carl Heymanns Verlag. 1934. vii and 183 pp. (RM. 4.80.)

The World Court. Hearing before the Committee of Foreign Relations, United States Senate. Government Printing Office, Washington. 1934.

Der Internationale Richter. Von VIKTOR BRUNS. Berlin: Carl Heymanns Verlag. 26 pp. (RM. 1.50.)

La Constitution Anglaise. Par SIR MAURICE AMOS. Traduit par P. DE LA PRADELLE. Paris: Recueil Sirey. 1935. ix and 221 pp. (18 fr.)

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht. Band IV, No. 1 (Januar, 1934). 1—192 pp. Band IV, No. 2 (May, 1934). 193—480 pp. Berlin und Leipzig: Walter de Gruyter & Co. 1934. These two issues contain a number of valuable articles on current questions of International Law.

Internationales Finanzrecht. Von ERNST ISAY. Stuttgart: Verlag W. Kohlhammer. 1934. v and 285 pp. (RM. 12.)

Urkunden und Forschungen zum Internationalen Recht. Herausgegeben von Mitgliedern der Hamburgischen Juristen-Fakultät. Bd. II. Klagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts. Von DR. MAGDALENE SCHOCH. 160 pp. (RM. 8.) Bd. III. Der briefliche und telegraphische Vertrag im vergleichenden und internationalen Privatrecht Unter Berücksichtigung des deutschen, englischen, französischen und italienischen Rechts. Von ERNST ACHENBACH. 98 pp. (RM. 4.50.) Leipzig: Bernhard Tauchnitz. 1934.

Staatslehre. Von HERMANN HELLER, weiland ord. Professor des Staatsrechts an der Universität Frankfurt a M. Leiden: A. W. Sijthoff's Uitgeversmij N. V. 1934. 298 pp. (Brosch. 5.25 H.fl.; in Leinen 6.25 H.fl.)

Georgetown Law Journal. Washington D.C.: Georgetown Law Journal Association. Vol. XXIII, No. 1, November, 1934. The leading articles of interest to us are 'Provisional Arrest and Detention in International Extradition—A Survey of Practice and Procedure', by H. G. REUSCHLEIN; Vol. XXIII, No. 2, January, 1935, 'The Non-Conforming Use and Due Process of Law', by J. D. O'REILLY, Jun.; 'International Law and Deprivation of Nationality,' by LAWRENCE PREUSS. (\$2.50.)

We have also received the Tercentennial Number of the *Georgetown Law Journal* and the two succeeding numbers (Vol. XXII, Nos. 2, 3 and 4). Professor James Brown Scott contributes an article on *Modern Law of Nations and its Municipal Sanctions*, and Professor Robert A. Mauser writes on *Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act*.

Tulane Law Review. Vol. VIII, No. 3, April, 1934. Leading articles of interest to us are 'The Crisis of the Science of Law', by GIORGIO DEL VECCHIO; 'The Place of "Case" in the Common and Civil Law', by FRANCIS DEÁK; 'The Use of Decisions by United States Students of Civil Law', by GORDON IRELAND; 'The International Institute of Rome for the Unification of Private Law', by RENÉ DAVID; Vol. VIII, No. 4, June, 1934, 'Administrative Law in the United States', by MITCHELL FRANKLIN; 'Undue Influence and Captation—A Comparative Study', by E. NATHANIEL CAHN; Vol. IX, No. 1, December, 1934, 'Responsibility of the State in Internal (Municipal) Law', by ERNST FREUND; Vol. IX, No. 2, 'Critical Remarks on the Law of Bills of Exchange of the Geneva Convention', by ELÈMER BALOGH; 'Penal Clauses in Contracts', by JAMES B. THAYER; 'Practical Ethnology in Modern Jurisprudence and Legislation', by LEONHARD ADAM. (\$4.00.)

The Crisis of the Science of Law. By GIORGIO DEL VECCHIO. Reprinted from VIII *Tulane Law Review*, 1934.

La Crisi dello Stato. Seconda edizione. By GIORGIO DEL VECCHIO, Director of the Faculty of Law of the University of Rome. 1934.

The University of Toronto Law Journal. Vol. I, No. 1, 1935. University of Toronto Press. (\$2.50.) The leading articles are 'Fundamentals of a New Law of Nations', by P. E. CORBETT; 'Restatement of Contracts and Agency', by CECIL A. WRIGHT; 'Three Approaches to

Administrative Law: The Judicial, the Conceptual, and the Functional', by JOHN WILLIS; 'The Comparative Jurisprudence of Criminal Process', by F. C. AULD; 'Le Code Civil de la Province de Quebec et son Interpretation', by the HON. P. B. MIGNAULT. There are notes and documents—Japan-Canada, Nationality, Roman-Dutch Law, Status of South Africa; and a Survey of Canadian Legislation. The notes on cases are very instructive and extremely well done, and the book reviews are thorough. We congratulate the University of Toronto Law School upon the appearance of its first number, the quality of which is excellent. Under the able editorship of PROFESSOR KENNEDY and with the co-operation of lecturers, graduates and practising lawyers, we feel sure that the new venture will be a continuing success.

Giustizia e Diritto. By GIORGIO DEL VECCHIO. Estratto dalla Rivista Internazionale di Filosofia del Diritto. Roma. 1934.

Individuo, Stato e Corporazione. By GIORGIO DEL VECCHIO. Roma. 1934.

Etica, Diritto e Stato. By GIORGIO DEL VECCHIO. Roma. 1934.

Il Problema delle Fonti del Diritto Positivo. By GIORGIO DEL VECCHIO. Estratto dalla Rivista Internazionale di Filosofia del Diritto. Roma. 1934.

The University of Texas Bulletin, No. 3437, October, 1934. 'The Defendant and Criminal Justice', by ROSCOE C. MARTIN. Bureau of Research in the Social Sciences Study, No. 9. A study of criminals, how they are punished and how they respond to and make use of the Court processes.

Internationaler Schutz von Anleihegläubigern. Von DR. MARTIN DOMKE. Wien. 1934. (3s.)

Résolutions Votées par la Conférence à L'Unanimité. Conférence sur la Méthode et L'Organisation de L'Enseignement du Droit des Gens et des Relations Internationales. Lwów, Poland. 1934.

Ancora Sull'Analogia nel Diritto Penale Sostanziale. By GENNARO ESCOBEDO. Estratto da la Giustizia Penale. Citta di Castello. 1934.

Treasure Trove Case. Daily Record, Baltimore, February 16, 1935.

L'Émigration de la Campagne a la Ville Libre de Florence au XIII^e Siècle. By JOHAN PLESNER. Traduction du Manuscrit Danois par F. GLEIZAL en collaboration avec L'Auteur. Glydenhal, Ltd. Copenhagen. 1934.

In Re the World Court. The judgment of the American Bar as expressed in resolutions of National, State and Local Bar Associations, 1921-34. Foreword by HOMER CUMMINGS, Attorney-General of the United States. Edited by PROFESSOR MANLEY O. HUDSON, Harvard Law School. American Bar Association, Chicago. 1934. Every bar association in the United States has urged adherence to the Permanent Court of International Justice.

Practice Before the Masters in the King's Bench Division. A Lecture delivered in the Middle Temple Hall to Judges and Lawyers from U.S.A.

in 1930 with corrections to 1934. By SIR GEORGE BONNER. London: Stevens & Sons, Ltd. 1934. 36 pp. (2s.) A lucid account of a difficult subject written by an expert.

German Commercial Policy. By WILHELM RÖPKE. London: Longmans, Green & Co. viii and 86 pp. (5s.) This is a publication, No. 12 of the Graduate Institute of International Studies at Geneva, dealing with the rise of protection in Germany from the time of Bismarck until to-day. It deals with the crisis of 1931 and urges greater freedom in international commercial relations.

The Problem of the Defaulting Purchaser. Being a Collection of Articles from the Australian Law Journal, together with an Introduction, Notes, and an Appendix of Forms. Edited by P. R. WATTS, B.A., LL.B., Solicitor. Sydney, Melbourne and Brisbane: Law Book Co. of Australasia, Ltd. 1934. viii and 144 pp. (8s. net.)

French Law as Applied to British Subjects and Companies. By RAOUL AGHION. London: Stevens & Sons, Ltd. 1935. xv and 144 pp. (10s. net.)

Death Duties. Index and Summary. By D. GWYTHER MOORE, a Solicitor of the Supreme Court. London: Sir Isaac Pitman & Sons, Ltd. 1933. (2s. 6d. net.) A useful compendium which should be of much assistance in everyday practice.

Two Ways of Thinking. By the RIGHT HON. LORD MACMILLAN, LL.D. The Rede Lecture delivered before the University, May 9, 1934. Cambridge: At the University Press. 1934. 45 pp. (2s. net.)

Lectures, Reading and Examinations. By T. R. PARSONS, Sidney Sussex College, Cambridge. Cambridge: W. Heffer & Sons, Ltd. 1934. 42 pp. (1s. 6d. net.) Contains a number of useful suggestions on reading, taking of notes, and preparing for examinations of which students would be well advised to take heed.

Russell on Arbitration and Award. Thirteenth edition. By EDMUND CAVE, Arbitrator, formerly a Master of the Supreme Court of Justice, and ERNEST WETTON, of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1935. lvi and 730 pp. (£2 2s. net.) (We hope to review this in our next issue.)

A History of the English Courts. By A. T. CARTER, C.B.E., K.C. Being a Sixth Edition of a History of English Legal Institutions. London: Butterworth & Co. (Publishers), Ltd. 1935. viii and 183 pp. (15s. net.) (Will be reviewed in the next issue.)

English Constitutional Documents, 1307—1485. Edited by E. C. LODGES and G. A. THORNTON. Cambridge University Press. 1935. xxvii and 430 pp. (12s. 6d. net.) (We hope to review this in our next issue.)

Contribution in Fire Insurance. By H. S. BELL, Barrister-at-Law, Fellow of the Chartered Insurance Institute. London: Stevens & Sons, Ltd. 1935. xvi and 279 pp. (15s. net.)

The following book reviews were sent too late for insertion otherwise than as an appendix.—Ed.

Some Aspects of the Covenant of the League of Nations. By Sir JOHN FISCHER WILLIAMS, C.B.E., K.C. Oxford University Press: Humphrey Milford. 1934. vii and 322 pp. (10s. 6d.)

THIS is a book which all students of International Law, and indeed, also, those of international relations, would do well to read. Apart altogether from the merits of the work itself, there is documentation which is more usually met with in publications from the United States of America. The Appendices include the text of the Covenant, of the Pact of Paris, and of President Wilson's Fourteen Points, as well as a reproduction (with slight modifications) of the learned author's article published in this Journal (Vol. V (1933), pp. 1—21). Further, there are (on p. 292) additional references to other articles of more recent publication bearing upon the same discussion, namely, 'The Covenant of the League of Nations and War.' One can welcome such additions to books which primarily must appeal to the student while at the same time regretting that the price of the publication puts the work rather out of the question for the average student. This defect is probably caused by the very additions which are so valuably appended.

It is suggested by the publisher that 'the Author of this book regards the Covenant of the League of Nations as a statement of principles rather than as the complete legal text of an International Constitution. He believes that these principles must be worked out and modified in accordance with the needs of a changing world, and from this point of view has written a book unique in the literature of the League.' One can easily agree with the view of the author, and sympathise with his caution when (at p. 33) he says, '... we must be careful not to encourage the superstition that there exists somewhere a "legal" interpretation, somewhat esoteric in character, but yet ultimately more authoritative than the interpretation of the plain man. There is no such thing as a binding "legal" interpretation of the Covenant somehow different from that which the ordinary man of common sense and honest intention would approve.' Nevertheless, after perusal of the book, one believes that it 'would be a mistake to examine the Covenant with a legal microscope', but that the student who also reads the book will feel that he has indeed seen the Covenant in precisely those conditions.

The first two chapters are devoted to consideration of the Covenant in the circumstances of its birth, and of its general scheme. These two chapters, taken together with the third, which deals with the organization of the League, will provide the student with an admirable working knowledge of the history of the League in its formative period and of its present constitution. Chapter IV is perhaps the most interesting. It deals with the articles of the Covenant which aim at the 'Prevention of War'. Here, the learned author sees 'Two important principles of what one may call the international technique for the avoidance of war...'. The first is the 'principle of delay', and the other is 'the principle of the distinction between what are sometimes called on the one hand "legal," and on the other hand "political" disputes; for "legal" and

"political" the expressions "justiciable" and "non-justiciable" are sometimes employed.'

The subject of Chapter V must inevitably in the future become more and more important. This part of the book on 'Treaties and Change' is interesting for the student in that it brings closely together the working of Articles 19 and 11. It seems unfortunate, however, that an interpretation of Article 18, which would require international engagements to be put into writing in order that they should be 'binding', should be regarded as 'an international "Statute of Frauds"'. This can only mislead as to the effect of that much abused Statute.

The two concluding chapters traverse the subjects of 'Minorities and Mandates' and 'Amendments and Supplements to the Covenant'. The spirit of the last chapter may be summed up in a quotation from p. 241. 'For deliberate attempts to improve the Covenant, a strong case must be made; such attempts necessarily produce in the popular mind a diminished estimate of the value of the Covenant; to be always tinkering at a building implies small confidence in its strength.'

As the learned author remarks, in conclusion (at p. 242), 'The Covenant admittedly is an imperfect document. It is not scientific in its drafting. It contains some obscurities and perhaps some repetitions . . .' Who reads this book must, nevertheless, feel that a searching analysis has exposed the implications of the various articles of the Covenant, as they appear to the lawyer-commentator.

J. O. J. M.

The Development of International Law by the Permanent Court of International Justice. By H. LAUTERPACHT, LL.D., Dr. Jur., Dr. Sc. Pol. London: Longmans, Green & Co. 1934. ix and 111 pp. (6s. 6d.)

In this most interesting little book, Dr. Lauterpacht sets out to show that the result of the work of the Court is 'not a mere collection of interesting points of law', and in this he may be said to have succeeded to an alarming degree. To the man in the street the book may be informative, to the student it should be provocative, but in the Chancellories it must prove a most disturbing work. If Dr. Lauterpacht is correct in his 'opinions' of the deductions and inferences which may legitimately be drawn from the pronouncements of the Court, the process of development of International Law has proceeded far beyond what any of those who are entrusted with the guidance of international relations would ever dream.

The object of the lectures (delivered at the Graduate Institute of International Studies at Geneva in January, 1934) which are in this book reproduced is 'to examine, in terms of some typical problems of the judicial function, the principal tendencies which have distinguished the work of the Court and which permit some forecast as to the temper in which it is likely to approach future cases.' The 'Law Behind the Cases', 'Judicial Caution', 'Judicial Legislation', 'Effectiveness of the Law', and 'The Court and State Sovereignty' are the titles of the chapters.

The gist of the work is to the effect that, despite the utmost 'judicial

caution' on the part of the judges of the Permanent Court, there is to be discerned a trend of 'judicial legislation'. No one who has the development of International Law as a means for ensuring peaceful settlement of the disputes of States at heart will disapprove of this tendency, but it may be doubted whether a too open admission of the extent to which the development is due to this international judicial body is 'politic'. In the last chapter on 'The Court and State Sovereignty' Dr. Lauterpacht seems perhaps to anticipate this ground of criticism of his admirable research along a quite new line, when he says '. . . it is to be hoped that neither the Court nor Governments will allow themselves to be overwhelmed by the realization of the cumulative effect of the decisions of the Court on matters affecting the sovereignty of States directly or indirectly.' With that hope one must associate oneself and at the same time wholeheartedly recommend this book to the consideration not only of those who are students of International Law but also to all those who are desirous of seeing the development of a permanent judicial body for settling international disputes without resort to war and in a thoroughly judicial manner. Naturally, this involves a 'jurisprudence', and this book indicates clearly that one may already find it by careful analysis of the decisions and opinions of the Court.

J. O. J. M.

Thomas and Bellot's Leading Cases in Constitutional Law.
Seventh edition. By E. SLADE, M.A., of Lincoln's Inn,
Fellow of St. John's College, Oxford. London: Sweet &
Maxwell, Ltd. 1934. xix and 392 pp. (10s. 6d. net.)

THE sixth edition of this case-book in Constitutional Law appeared in 1927 and the present edition follows its predecessor closely. A change has been made, however, in collecting six cases on trade unions into a section of their own at the end of the book. Taken as a whole, the book is a useful aid to the student of Constitutional Law and contains, besides some one hundred and forty cases, references to many more in notes to be found interspersed between the leading cases. As a quick and clear method of finding information upon most subjects included in Constitutional Law reference to this book will be found of the greatest assistance. It is not, however, possible to agree entirely with the choice of subjects dealt with and with the selection of cases in each subject. Certain of the subjects dealt with in the latter part of the book could really find a more suitable place in a book of criminal law. While it is true that the law on certain subjects, such as Treason, Sedition, and the Liberty of the Person, is to be found in a succession of cases extending over a long period of years, it is at least doubtful how far it is appropriate to include no less than fifteen cases on Sedition and nineteen on Treason or Treason-Felony in a book dealing with Constitutional Law. Again, in future editions it might be worth while to omit certain of the older cases in favour of modern examples. For instance, in the section relating to Blasphemy, in view of the masterly review of earlier cases and enunciation of principle to be found in Lord Sumner's judgment in *Bowman v. Secular Society* [1917] A. C. 406, it is surely not necessary to find a place

for three earlier cases. Out of the fifteen cases devoted to Sedition, Seditious Libel, and Seditious Conspiracy no fewer than thirteen are before 1850 in date and it would seem that the omission of a considerable number of such earlier cases, which only contain authority for certain rather remote principles in this branch of the law, would add considerably to the value of the book to students. A place could surely be found for many of these cases in a footnote. The space thus provided might profitably be employed by the inclusion of recent cases of great importance, e.g. *R. v. Minister of Health, ex p. Yaffé* [1931] A. C. 494, or by a section dealing with the position of the British Empire in Constitutional Law. The complete omission of this last seriously impairs the value of this work, and the editor of future editions might perhaps consider if the balance of the whole book would not better be preserved for the present-day student by the omission of many of the early cases on some of the subjects suggested above and the inclusion of a reference to the Statute of Westminster.

P. H. D.

Mather on Sheriff and Execution Law. Third edition. By C. R. WIGAN, M.A. (Oxon), Solicitor and Under-Sheriff for Surrey, and the Hon. DOUGALL MESTON, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1935. xci and 702 pp. (£2 2s. 0d.)

THIRTY years have elapsed since the last edition of this standard work on sheriffs appeared, and a new edition incorporating statutory and case law developments is very welcome.

Every department of a sheriff's office and duties is exhaustively covered. The topics dealt with range from a full treatment of all the writs of execution and relevant parts of the law of bills of sale and bankruptcy, down to proper dress and the order of procession from station platform to carriages when the judge arrives for Assizes. Forms and full information on fees are also given.

The text appears to have been thoroughly brought up to date, e.g., with reference to walking possession, and we notice no important omissions. On page 88, in dealing with what amounts to breaking by a sheriff in levying execution, reference might have been made to *Ryan v. Shilcock*, 7 Exch. 72, where it was held not breaking for a landlord to open an outer door by the usual means adopted by persons having access to the building, e.g., by turning the key, lifting the latch, or drawing back the bolt, and the Court seemed to hold the view that the same would apply to an execution.

The original arrangement has been substantially adhered to with the exception that two chapters relating to the history of the office of sheriff have been added at the beginning. The book remains indispensable to sheriffs and under-sheriffs and for reference purposes to all legal practitioners.

R. H. K.

The Law of Licensing. By C. C. ROSS, M.A., of Lincoln's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1934. xxi and 265 pp. (12s. 6d.)

THE first ninety-six pages of this work contain a clear summary of such parts of the law affecting licensing as particularly concern licensed victuallers and their legal advisers, written with special reference to the findings of the recent Royal Commission, and the remainder consists of the text of the Licensing Acts, tables of fees payable, and forms and rules thereunder.

The book, especially the first chapter, on the History of Licensing, may be recommended to the attention of all who are interested in the future course of events with respect to the regulation of the sale and consumption of alcoholic liquors.

R. H. K.

The Law of Damages. By S. JACKSON, B.A. (Oxon), LL.B. (Lond.). London: Stevens & Sons, Ltd. 1934. xvi and 135 pp. (6s.)

TO Bar students reading Damages as a special subject, for whom it is primarily intended, this little book should prove helpful. The earnest student will, of course, still read Mayne, but may well preface his deeper incursion into the subject by a perusal of this outline.

The discussion of the *Polemis Case* seems rather brief in view of the enormous controversy, not yet ended, which it aroused, and, rather surprisingly, no mention is made of the *dicta* in *Smith v. L. & S. W. Ry.* (1871) L. R. 6 C. P. 14.

R. H. K.

Solicitors' Book-Keeping. By JOHN R. PRICE, A.C.A. London: Sir Isaac Pitman & Sons, Ltd. 1934. vii and 116 pp. (6s.)

THE Solicitors Act, 1933, and the Rules made thereunder by the Law Society with the approval of the Master of the Rolls, necessitated modification of the book-keeping systems in use in many solicitors' offices.

The object of the Rules, which came into force on January 1, 1935, was, of course, to stop defalcations, and the principal steps taken in this direction were to render compulsory the keeping of separate bank accounts for clients' moneys, and to give to the Council of the Law Society power to compel any solicitor to produce for inspection his books.

This work describes clearly, with specimen entries, a system of accounts for a solicitor's office, complying with the requirements of the Rules, which should prove both efficient in its results and simple in operation.

R. H. K.

Essays in Constitutional Law. By W. P. M. KENNEDY. London: Oxford University Press. 1934. xv and 183 pp. (\$2.50.) (Will be reviewed in the next issue.)

Deutschlands Gleichberechtigung als Rechtsproblem. Von VIKTOR BRUNS. Berlin: Carl Heymann's Verlag. 1934. (RM. 1.)

La Réalité des Normes. By HANS MORGENTHAU.

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